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**FOREIGN DEVILS:  
LAW'S IMPERIAL  
DISCOURSE AND THE  
STATUS OF TIBET**

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Thesis submitted for the degree of PhD in Law

2013

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## **Declaration for PhD Thesis**

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## **Acknowledgements**

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## Abstract

In 1951 Tibet was incorporated into the People's Republic of China by the Seventeen Point Agreement. Today the legal status of Tibet remains a matter of contention between the PRC and the Tibetan-Government-in-Exile. Both rely upon on legally ambiguous British engineered treaties to make their case. The inconsistent representation of Tibet's status in treaties is not, however, a reflection of the ambiguity of Tibet's status itself; it is a reflection of the ambiguity of such treaties in the context of the positivist-colonial encounter.

Drawing primarily upon British Government archives, this thesis examines the issue: to what extent, in what ways, and with what effects has the British imperial legacy in the region converged with Chinese formulations of law and governance in Tibet to prejudice understanding of Tibet's legal status. This addresses a significant gap in international legal literature, which seldom discusses Tibet outside of considerations of minority rights within the PRC.

This thesis argues that an assessment of imperialism and its relationship with nineteenth century international law is essential to explaining the events of 1951, but it is only through a reassessment of the postcolonial that the absence of discussion of Tibet's status in international legal discourse can be explained. The history of Tibet's legal status highlights contradictions embedded within modernity and exposes the mythological foundations of the modern secular state's narrative of progress.

This thesis concludes that the much emphasised clash between Western and East Asian values in the field of international law in truth operates along a much narrower divide than might be presumed. This is best assessed as a reflection of the contradictions inherent to the postcolonial within international law; involving both a pushing away of the imperialistic past and a reaffirmation of its continuity in order that modern commitments to the rule of law retain value.

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# Chapter One

## Introduction

I hereby make known these commands to all you righteous folk, that ye may strive with one accord to exterminate all foreign devils, and so turn aside the wrath of heaven. This shall be accounted unto you for well doing; and on the day when it is done, the wind and rain shall be according to your desire.<sup>1</sup>

[T]he demon-masked ones from England came to the border and invaded with an army . . . Not long after they came to Lhasa making a clamour of meaningless noise.<sup>2</sup>

This thesis begins with the observation that there were fundamental differences in how Tibet and China sought to resist Western imperialism. At the end of the nineteenth and early twentieth centuries, China embraced Western styled legal and scientific values as a means to achieve modernisation and preserve China's international standing. Meanwhile, the religious foundations of the Tibetan state necessitated a different kind of negotiation with modernity.

Furthermore, Tibet's freedom to pursue a unilateral strategy of modernisation was limited by its geographical location between the three great powers of Russia, China, and British India. Initially Tibet sought to minimise contact with British India. This policy changed in the early twentieth century when China became the more immediate threat.

By strengthening ties to British India, Tibet gained some measure of protection from Chinese encroachment. However, this set Tibet apart from a rapidly modernising society of postcolonial states. Additionally, it was British policy to keep

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<sup>1</sup> Excerpt from a placard posted in West City, Beijing during the Boxer uprising of 1900 (Coates 2000:128).

<sup>2</sup> From the Thirteenth Dalai Lama's (1876-1933) official hagiography, *A String of Wondrous Gems, a Drop from the Ocean of Liberated Life of the Great Thirteenth, the Incomparably Kind Lord of All Buddhas, He of the Highest Stage, Crown Ornament of Samsara and Nirvana*. Cited in French (1995:240).

Tibet's legal status ambiguous. This ambiguity has complicated subsequent considerations of Tibet's legal identity.

The legacy of the British involvement in the region is discernible in contemporary PRC law and policy in ethnic Tibetan areas. It has also, as this thesis will show, revealed contradictions within postcolonial international legal discourse. There is a shortfall in legal orientated historical studies that place Tibet's legal identity in such a context. It is hoped that this study might help to fill this gap.

## **1:1 Context**

In 1950 the People's Liberation Army of the People's Republic of China (PRC) invaded Tibet. Following the Tibetan defeat, Tibet was incorporated into the 'motherland' by the Seventeen Point Agreement of 1951. In the contemporary international legal context, the primary issue is the nature of Tibet's status prior to 1951. If Tibet was a state when China took military control of Lhasa, then the legal principles governing the use of force (Art 2(4) UN Charter) and the conquest of territory apply. If Tibet was not a state, the issue is one internal to China, although certain issues of international human rights law may be relevant. Self-determination principles may also apply, regardless of whether China is an occupying or colonial power. However, prevailing opinion is that self-determination does not generally signify a right of secession except in the decolonisation process. In the postcolonial world, self-determination is a gift bestowed by states, not a privilege usurped by Emperors, and '[t]he end of Empire has merely revealed most states to be imperial' (Simpson 1996:35)

In this context, it is not surprising that the debate over Tibet's status tends to present the issue as a local conflict between Tibet and China. Whether or not the conflict is seen as inter-state or intra-state varies, but the essential dynamics of the arguments employed remain the same. This has obscured from view the fact the legal status of Tibet was first brought into question by European powers. Britain, in particular, played a key role by employing the term suzerainty to define Imperial China's role in Tibet. The British use of the term suzerainty served strategic purposes, for the British objective at the turn of the twentieth century was to establish Tibet as a neutral buffer state. Reports of intrigue between Russia and Lhasa had compelled the British Government of India to

adopt a 'forward' policy so as to secure the frontier of the Empire. For the British project to be successful, it was essential that Tibet was neither wholly part of the British Empire nor wholly part of the Chinese Empire. At the same time, it was equally important that Tibet was not wholly independent and free to forge an alliance with Russia.

The use of the term suzerainty had far reaching consequences, creating an uncertainty about Tibet's status before 1951 that has yet to be fully resolved. Suzerainty is a highly ambiguous term, derived from European feudalism, and falling into an indeterminate conceptual space somewhere between that of protectorate, which implies international legal personality, and that of autonomous region, which does not. The *Raan of Kutch Arbitration* implied that vassal states did possess international legal personality.<sup>3</sup> However, much earlier the Permanent Court in *Nationality Decrees in Tunis and Morocco*, had emphasised that the legal status of dependencies needed to be assessed according to their individual characteristics, a task which the international legal community has largely failed to do in the case of Tibet.<sup>4</sup> Furthermore, there is a danger that the use of ambiguous terminology is taken to reflect an actual ambiguity of status, rather than any ambiguity in the defining process itself. Questions remain regarding the applicability of European feudalistic terminology, to a non-European legal tradition grounded in distinctly non-European philosophy.

Although known primarily as a centre of religious monasticism, Tibet has a long, culturally distinct, legal tradition and exerted significant regional influence, mediating in the Anglo-Bhutanese war of 1774 for example. Meanwhile both the Republic of China and the People's Republic of China have claimed that Tibet was part of China. This claim draws heavily upon accounts of Tibet's incorporation into the Chinese sphere according to the overarching ideology of the traditional Chinese tribute system. This ideology was grounded in Confucian values which placed the Chinese emperor at the apex of a moral, hierarchical order.

Both Tibet and China viewed themselves as centres of advanced civilisation, but so too did the Western imperial powers. The ideological impetus of Western colonialism was the 'civilising mission,' this being central to late nineteenth century

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<sup>3</sup> 1968 7 ILM 675, 696-699

<sup>4</sup> 1928 Ser. B No 4. 27

juristic efforts to locate international law, as a discipline, within the context of a rational, scientific discourse. At the heart of this project was the need to establish a basis by which political entities could be dealt with in the context of the empire, and the perceived need to achieve this according to the dictates of rational, objective scientism. In this context, the British policy of keeping Tibet's legal status ambiguous became problematic.

The traditional Chinese tributary system gradually broke down following the annexation of Chinese territory by Western powers after 1842. The regime of unequal treaties, by which Western powers gained control of Chinese ports, was clearly the most overt threat to China. However, Western expansionism throughout Asia was seen as a threat to the traditional Chinese world order. Both fuelled a growing wave of Chinese nationalism, a movement that gained momentum by the end of the nineteenth century. To better compete with Western powers efforts were made to translate European jurisprudence into Chinese. Post 1911, the Nationalist Government of China furthered this cause, using the language of science and international law to articulate its strategy to restore China to greatness. To these ends, there was an adaptation of Social Darwinism—a system of thought that had supported colonialism in Western constructions.

Against this backdrop, there was considerable hostility towards religious activity. Between 1900 and 1930, various campaigns against rural religion were launched and various laws were promulgated to bring about the rational advancement of the masses.

The Nationalist anti-religion drives were not anti-Buddhist, and the implication is not that they became implicitly anti-Tibetan. Their significance lies in the formulation of a dichotomy between a traditional, religious, and superstitious past, on the one hand, and a secular, rational, and scientific future on the other. This laid the foundations for later ideological developments, where Maoism denounced all religion as not merely 'opium of the people,' but as 'poison' (Miller 1990:223). According to the theory of Marxist historical materialism, including that as adapted by Mao, societies founded on a religious basis are at a lower stage of evolution. Furthermore, Marxist historical materialism 'assumes a progressive development of human society towards greater union and the eventual overcoming of cultural, racial and linguistic barriers'

(Keller 1994:62) When the People's Liberation Army marched into Tibet to conduct the 'Peaceful Liberation,' their advance was distinguished from that of a non-socialist army. The People's Liberation Army was an interventionist force that existed to help the people when they were incapable of helping themselves, and should they be so uncivilised that they failed to appreciate the fact, then this only heightened the urgency of the development task at hand.

Religious activity remains one of the primary areas of contention between the Chinese Communist Party (CCP), and Tibetans living in what are now Tibetan Autonomous Areas of the PRC. Religious activity in Tibet is routinely regarded as a threat to national security. Tibetan religious activity is equated with Tibetan resistance, and is seen as more dangerous than the equivalents in the Chinese population.

The PRC has put considerable effort into redefining Tibetan culture in socialist terms with 'national local characteristics' (TIN and HRW 1996:156). This process requires a restructuring of Tibetan history. Hence, in schools the Tibetan word for history (*rgyal rabs*) is reserved for Chinese history, whereas Tibetan history is termed legends or fables (*lo rgyus*) (Kolas 1998:75). This reflects a dynamic also present in the wider international legal community. It is a dynamic born of the tension between the self-determining state, committed to modernity, and a wayward faction of potentially self-determining minorities, who may assert a worrisome, competing version of that modernity. The Communist assertion of a universal and inherently superior ideology has parallels within the traditional Confucian concept of *lai-hua*; it also has parallels with Western imperialism's 'civilising mission.'

## **1:2 Literature Review**

Tibet's legal status is seldom considered in mainstream international legal literature. Perhaps the first examination was provided by Alexandrowicz-Alexander (1954), who argued against the PRC's claim to Tibet. This article later served as the basis for Crawford's comments in *The Creation of States in International Law*, where Crawford (1979:213) conceded that the 'case of Tibet, in particular, highlights the rather arbitrary way in which, for their own purposes, the 'Powers' decided upon a particular course of action, and thus, in effect, determined the status of a people.'

The alternative position was argued by Rubin (1968). Whilst Rubin analysed the complex history of treaty relations between Tibet, China and Britain more extensively than Alexandrowicz-Alexander, his analysis is flawed by a failure to consider the evidence of other Himalayan states, or to consider Tibetan arguments on their own terms. Rubin disparages Tibetan claims on the basis that they rested solely on the Dalai Lama's religious authority. Tibetan statements are henceforth viewed with suspicion, whereas China, as a power seen to be more fully in line with the Western system, is *ipso facto* more capable of approaching legal truth. Rubin's article is interesting in that it underlines the ease with which the international legal documents regarding Tibet give rise to ethnocentric readings.

More recently the issue has been taken up by Sautman (2001) who has been critical of claims made by the Tibetan Government-in-Exile, viewing the Dalai Lama's arguments for Tibetan self-determination to be analogous to those made by the French far right leader, Le Penn. Sautman has rightly questioned the accuracy of statistics presented by the Tibetan Government-in-Exile regarding Tibetan deaths resulting from the Chinese occupation. However, he equates statistical discrepancy in the number of deaths with the falsity of Tibetan claims *per se*. Sautman argues that the Cultural Revolution resulted in numerous civilian deaths throughout China. On this basis Sautman argues that the humanitarian crisis in Tibet during that period should not be viewed as derived from illegal occupation. As an appeal to probability this argument is a logical fallacy and simply sidesteps the issue of Tibetan claims to self-determination.

Sautman's critique of the Tibetan-government-in-exile can be seen as a response to the notion that pre-1951 Tibet was a Shangri-la untainted by social inequality and injustice. Sautman challenges the notion that Tibetan rule was wholly good and Chinese rule is wholly bad. A similar attempt to undermine this dichotomy has been made by Grunfeld (1996), who asserts that Tibetans were superstitious, immoral, and promiscuous. Yet, this fails to collapse the dichotomy in question, for it relies upon the same opposition between a pre-modern Tibet and a modern China. The difference is only that in Grunfeld's analysis the pre-modern condition is unproblematically bad, rather than unproblematically good. Grunfeld employs a late twentieth century Western model of modernity to be the standard against which early twentieth century Tibet is to be measured. This is a fallacious argument. The Tibetan claim for self-determination is not

invalidated by the fact that pre-1951 Tibet, in common with most human societies, had failed to generate a truly egalitarian society.

Studies based upon extensive fieldwork in Tibetan communities, both in exile and in China, present a more balanced, and complex, picture of Tibetan society. Of particular note is the work of Goldstein, who has not shirked from discussions of inequality in Tibetan society. At the same time, Goldstein's work presents a clear picture of the uniqueness, continuity, and coherence of Tibetan political and legal institutions.

Whether arguing for or against Tibetan claims, the literature seldom provides any extensive historical analysis of Tibet's legal status. The exception is Van Walt Van Praag's analysis, *The Status of Tibet* (1987), which examines the legal history of the Sino-Tibetan conflict. This study presents the history of Tibet's independent treaty relations and argues that Tibet must be viewed as an independent state prior to 1951. Van Walt Van Praag draws attention to the fact that the use of the term suzerainty in describing China's relationship did little justice to the traditional relationship that existed between Tibet, China and neighbouring Asian states. The study highlights that the use of the term suzerainty was a product of Britain's commitment to the 'Great Game,' rather than any objective desire to ascertain Tibet's legal status according to Tibetan history.<sup>49</sup> This is the benchmark study, but because it maintains such close focus upon the question of whether Tibet possessed independent legal personality, the wider context of the Western colonial encounter with China is not examined. This leaves the question of the extent to which Western imperialism had a bearing upon China's reformulations of Tibet's status in international legal terms, and the extent to which China's expansion in Tibet was a defensive measure against the imperialist threat, largely unanswered. One of the original contributions that this thesis makes to the subject is that it addresses these issues. This thesis then moves beyond this by considering in what ways the legacy of this encounter continues to impact upon first, perceptions of Tibet's legal status and second, the development of PRC legislation in Tibetan Autonomous Areas.

Whilst the legal aspects of the conflict have not given rise to extensive literature, the 'Great Game', and its impact upon Tibet, has been extensively written about. The most notable studies are those by Addy (1984), Lamb (1989), and McKay

(1997) who have all made use of British Government of India archives to write diplomatic histories of British relations with Tibet from the end of the nineteenth century up to 1950. The studies all shed valuable light upon how British involvement precipitated a deterioration of Sino-Tibetan relations.

The degree to which the British involvement may be seen to have had a predominantly negative or positive effect is subject to slightly different interpretations. For example, the introduction to McKay states that, 'the author argues...that the most lasting contribution made by the British who served in Tibet lay in the powerful historical image they constructed of an independent Tibetan state' (McKay 1997:viii). Certainly, the writings of Sir Charles Bell and Hugh Richardson, both resident British officers in Lhasa prior to 1950, became central to the discipline of Tibetology (Bell 1987 and 2000, Richardson 1951, 1977, 1989, 1990 and 1998). Hugh Richardson, in particular, devoted his life to the scholastic study of Tibetan language and society, translating Tibetan legal documents, for example (Richardson 1989 and 1998). Drawing on first-hand knowledge he insisted that Tibet was an independent state prior to 1951. However, the sympathetic efforts of Richardson and Bell were reduced by the effects of an overarching British policy significantly less sympathetic to Tibetan interests. Indeed, Addy, concludes that there was, at times, a working alliance between British India and China, particularly around the time of the Younghusband invasion of Tibet (Addy 1984:29, 47, 55 and 59).

The reason for an alliance between British India and China is that British India and Imperial China shared a concern about Tsarist Russian expansion. To both, rumours about Russian and Tibetan intrigue were a source of concern. Russian government archives are a useful supplement to the literature. The work of Andreyev (2003) and Kuleshov (1996 and 2000) provide an analysis of these files in English, and provide important evidence regarding the complexity of Tibet's foreign relations. This reveals that the Tibetan government conducted independent negotiations with Russia, whereas China asserts that the Tibetan government had no such independent relations.

The nature of Tibet's dependency upon Imperial China is called into question by evidence from the Himalayan states of Bhutan, Ladakh, Nepal and Sikkim. Studies of Nepalese government archives concerning Tibet are of particular significance (Khan



1997, Mishra 1991, Rose 1971). Rose's study of Nepal's foreign relations with Britain, China and Tibet, from 1770 through to 1970, is useful in that it utilises both Nepalese and Chinese primary sources. These studies show that whilst Nepal paid tribute to China, Nepal considered itself a fully independent state. Furthermore, following the Nepal-Tibet War of 1854-6, Tibet paid tribute to Nepal in return for Nepalese military assistance. During this time both Nepal and Tibet continued to pay tribute to China. This reveals a far more complex web of trans-Himalayan/East Asian relations than Imperial Chinese based accounts suggest.

The dominant understanding of tributary relations between Imperial China and foreign states emerges from studies utilising Imperial Chinese archives (Fairbank and Teng 1941, Fairbank 1942 and 1968). These studies are useful in that they present the orthodox, Confucian worldview. However, caution must be exercised as the archives provide only a partial, one-sided, glimpse of the political reality of the time. For example, European states were recorded as tributary states of China and both England and Sweden were recorded as Dutch dependencies. With regards to Tibet, it is the orthodox Confucian Chinese representation of tributary relations that has subsequently gained pre-eminence. However, recent work has shown that Qing legal statutes dealing with border control incorporated a second level of rules and practices based upon principles of 'fairness, equality, reciprocity, and mutual respect for "territorial sovereignty"' (Edwards 1987:34).

The orthodox representation emphasises Tibet's inferiority and subordination to Imperial China. In part, the pre-eminence of this interpretation reflects the political reality of post 1950 events. Yet, it seems that the PRC's interpretation of traditional Sino-Tibetan relations is in sympathy with Western readings of the religious-secular dynamics that informed Tibet's traditional ties to China. Crucially, the tributary relationship existing between Tibet and Imperial China was distinct in that there was a religious element to the relationship not present elsewhere in the Chinese tributary system. In Tibetan terms, the relationship between China and Tibet was governed by the concept of *Cho-Yon* (priest-patron), in which the Dalai Lama gave spiritual protection to the Chinese Emperors in return for military assistance. The Cho-Yon concept is usefully discussed in a number of articles (Samdhong 1977, Norbu 1992, Klieger 1989, and Seyfort 1991, Shakebpa 1967).

There are many autobiographies published in English by Tibetans that experienced the events of the PRC takeover and later went into exile (Norbu 1997, Taring 1970, Shakebpa 1967, Gyatso 1990). These accounts are rich in eye-witness detail and all bring slightly differing perspectives. Taring, Gyatso, and Shakebpa were all members of the political elite. Norbu, meanwhile, came from a less-privileged rural background. In addition there is the account of the Tibetan revolutionary Phuntso Wangye, who founded the Tibetan Communist Party in the 1940s and the acting translator between Mao and the Dalai Lama (Goldstein, Sherap and Siebenschuh 2004).

In Tibet, complex legal and political ideas were transmitted in religious terms, and the spiritual authority of the Dalai Lamas did not preclude temporal authority, rather the two were intrinsically linked. This view is supported by French (1996), Shakebpa (1967), Thurman (1986), and Wangyal (1975), all of whom discuss the overlaps between Buddhist philosophy, law and politics in Tibet. However, throughout the period of British influence in Tibet, modernist Western discourse tended to emphasise the secular basis of legal and political power, and in this construction the legal and political authority of the Dalai Lamas, and by extension the Tibetan government, was diminished. The prevalence of this view is particularly evident at the end of the nineteenth century, and the turn of twentieth century, and can be discerned from the firsthand accounts of Western travellers to Tibet, including explorers, journalists, and British government officials. This literature includes primary source material such as unpublished official correspondence, private letters, diaries and published travelogues and memoirs (Landon 2002, Waddell 1905 and Younghusband 1996). Meanwhile in secondary sources, Bishop (2000) and Lopez (1998) have elaborated the persistence of this view in contemporary Western discourse.

The view that ecclesiastical rule was in some way inconsistent with modernisation was a view taken up by Nationalist China. Work by Paul Cohen, Duara, Li, and Schrecker provide insight into the shifting ideological and political landscape of Nationalist China in the period before the Communist victory of 1949 (Cohen and Schrecker 1976, Duara 1991 and 1997, Li 1964, Schrecker 1969). An understanding of the Chinese Nationalist movement is also dependent upon an understanding of the 'unequal treaty' system, whereby Western Powers secured territorial concessions

within China. In this regard, the work of Jerome Cohen, Chiu, Fung, Wang and Wesley-Smith is of note (Cohen and Chiu 1997, Fung 1997, Wang 1990, Wesley Smith 1998).

Marxist historical materialism, as adapted by Mao, extended the Social Darwinist theories of the Chinese Nationalists and advocated the evolutionary superiority of the non-religious, socialist state. The theory of historical materialism also supported a pre-existing racial classification system, in which Tibetans were ranked at the lowest rung of racial evolution and Han Chinese at the top. This racial classification in some ways reflects the Imperial Chinese assertion that Tibetans were barbarians, but in the traditional Chinese worldview, all foreigners were barbarians and the distinction made was arguably based upon cultural, rather than racial, characteristics. The rise of Nationalism shifted the conceptual basis of these distinctions, and a distinctive racial discourse emerged alongside concerns with modernisation, science, and rational progress. This discourse achieved continuity in Communist thought and persists today. The literature available to trace these developments includes translations of speeches and writings by Sun Yat-sen, Chiang Kai-shek and Mao Zedong. Contemporary sources include internal Chinese Communist Part reports and official PRC government white papers. The subject has also been usefully discussed by in secondary sources by Dikotter (1992), Schram (1963), Sautman (1997) and Zhao (2000).

### **1:3 Limitations**

#### **a) Geographical**

Traditional Tibet was divided into three principalities: Ut'sang, Khams, and Amdo. After 1951, Ut'sang became the Tibetan Autonomous Region of the PRC. Meanwhile, after 1955, Khams and Amdo became incorporated into modern-day PRC provinces of Gansu, Qinghai, Sichuan, and Yunnan. Today, the Tibetan areas within these larger Chinese provinces are granted a measure of autonomy at the prefectural and county level. This division is an extension of an earlier administrative division made by the Qing, which distinguished Outer Tibet (Ut'sang) from Inner Tibet (Khams and Amdo).

The separation between Ut'sang and the outlying regions of Khams and Amdo presents various methodological difficulties. For example, it becomes problematic to make general statements about the policy of the Tibetan state unless one identifies the territory being referred to. The Tibetan government in Lhasa exercised exclusive control over Ut'sang, but in Khams and Amdo the law and policy of the central government was applied inconsistently. Central government control was particularly weak in Khams, a sparsely populated region inhabited by nomadic tribes. Khams was largely autonomous and customary nomadic law prevailed. Furthermore, the Sino-Tibetan border was highly indeterminate; ongoing cross-border conflicts between the Tibetans of Amdo and Khams and the Chinese meant a constant shifting of alliances. Hence, ethnic Tibetans in such areas sometimes found themselves subject to both Tibetan and Chinese (Qing and Nationalist) law and tax obligations.

When turning to contemporary analysis, it is necessary to remain mindful of the fact that by incorporating large tracts of Tibetan areas into Chinese regions, not only does the land mass of traditional Tibet appear radically reduced, but so too does its population. One of the frequent sources of discrepancy between statistics given by the PRC, and those given by the Tibetan Government-in-Exile, is that the former will refer to the 'reduced' Tibet, whilst the latter will be considering 'greater' Tibet in its entirety.

## **b) Sources**

This study utilises a variety of primary and secondary sources. These sources are limited to English language materials. Primary historical sources include British government files that cover the period of British influence in Tibet (1904-1950). Other documents that can be considered primary sources are treaties between Tibet, China, Britain, Nepal, Russia and Mongolia. Contemporary primary sources comprise of official translations of PRC legislation. There are also a large number of official PRC government white papers and speeches by key party members that exist in translation. In addition my analysis is at times informed by personal conversations held with Tibetans in exile. This includes conversations with Samdhong Rinpoche, the Prime Minister of the Tibetan Government-in-Exile, the ex-political prisoner Ven Bagdro, as

well as many individual Tibetans who have undertaken unauthorised and dangerous journeys across the Himalaya in order to reach the exile community.

The British government files are wide ranging. They include subjective accounts, in the form of diaries and personal letters, as well as official correspondence and reports. As such, they provide crucial insight into the frequently divergent views and objectives of Whitehall, the British Government of India, and British officials in the field. One of the limitations of these files is that internal power struggles between key correspondents impinge upon content. For example, in the decade preceding the British 1904 invasion of Lhasa, the Viceroy of India, Lord Curzon, gave increasing significance to the threat of a possible Russian and Tibetan collaboration. It is true that the Lhasa administration were strengthening diplomatic ties with Russia at this time, but it is also evident that Curzon was manipulating the extent of this threat so as to win support from the home government for his expansionist imperial policy.

As far as Chinese materials go, there is a significant corpus of work existing in translation. Certainly, one cannot be confident that these translated materials are representative of the situation on the ground, but they are invaluable for understanding the official policy position.

Unfortunately, the limitations that arise when considering Tibetan materials are more severe. In part, this is due to the destruction of Tibetan records, along with all but a handful of Tibetan monasteries, following the Chinese occupation (Shakya 1999:512). At the same time, many Tibetan texts were preserved by the tens of thousands of refugees who fled into exile after 1959, following the final disintegration of the 1951 Seventeen Point Agreement. The priority at this time was preserving key religious scriptures. This study does not provide an extensive examination of the domestic legal system of Tibet, and therefore this documentary deficit is not a substantial limitation. Nevertheless, it is clear that the loss of Tibetan legal materials has helped perpetuate the view that Tibet was a society without law. Tibetologists have focussed upon matters relating to Tibetan Buddhist philosophy rather than Tibetan law.

One of the underlying challenges to balancing Tibetan and Chinese accounts of their shared history is the fact that there is a general lack of overlap between Tibetan

and Chinese historiography. It is not simply that they each give divergent accounts of the same events. Rather, they tend to be concerned primarily with events taking place within their own geographical boundaries, and hence display a lack of awareness of external developments. An important caveat here is that it is difficult to ascertain the extent to which this is a product of Western academic classification, and the inadequacy of translated sources. However, within the Qing sources that exist in translation there is a lack of coverage of Sino-Tibetan relations. As with the limitations affecting the British records, this highlights the necessity of triangulating data between a variety of sources.

### **c) Theoretical**

As well as a number of specific limitations inherent to the source materials utilised in this study, there are a number of more theoretical limitations to be considered.

Delgado and Stefancic have shown how classification systems within Western academic libraries lead to an implicit favouring of traditional legal theory. Meanwhile, "transformative ideas and analogies" remain hidden from view (Delgado and Stefancic 1990:225). Whether conscious or not, the result has been an implicit acceptance that particular Western legal sources carry more weight. This state of affairs is self-perpetuating, for once excluded, minorities, by definition, lack the authority of central sources, and can hence be dismissed.

Processes of marginalisation within Western academia have particular significance in relation to Tibet. For example, due to the way in which the discipline of Tibetan studies has been constructed, defined, and funded within academia, Tibetologists have found themselves sidelined from mainstream academic discourse. Katz (1983) has shown how the reclassification of the discipline as an East Asian subject in America, resulted in the erasure of Tibetan Studies from traditional academic fora. This was a direct result of a corresponding shift in the government's foreign policy. The situation was compounded by an already existing disparity between Sinology and Tibetology, for there has seldom been a meaningful confluence between the two disciplines. After all, the Tibetan language and religion has South Asian, Sanskritic origins, rather than East Asian, Sinitic ones. Katz also highlights how Tibetologists were

placed under increasing institutional pressure to display 'academic neutrality,' the argument being that, only then 'can issues of political, moral and intellectual import be addressed rationally.' The net result was, according to Katz, that 'in essence, I have found it more difficult to locate a forum for addressing questions about Tibet than for any other issues' (Katz 1983:8).

#### **1:4 Evaluation**

This thesis covers a large terrain, both geographical and historical. It is necessary to acknowledge that clarity gained at the macro level, will be at the cost of micro detail. Nonetheless there are important reasons for undertaking such a broad survey. Placing the issue in historical and comparative perspective reveals some of underlying dynamics that have shaped perceptions of Tibet's legal identity. The terms by which China expressed a claim to Tibet underwent a significant shift after the demise of the Qing dynasty. This shift was both a product of and a response to Western imperialism. The belligerency with which China has subsequently defended its claim to Tibet can be seen as a defensive reaction against foreign aggression. However this does not adequately explain the lack of consideration of Tibet's legal identity in international legal discourse.

In official PRC statements regarding Tibet it is possible to detect a genuine incomprehension as to why Tibet should fail to welcome Chinese intervention. From this point of view, Tibet was feudal and superstitious and in need of external help in order to achieve modernisation. There are important parallels between this perception and that embedded within nineteenth century European imperialism: both legitimised their role by reference to a 'civilising mission' based upon a combination of science and law, and framed by a universalistic discourse of modernity. By conducting a wide ranging analysis, this study highlights significant overlaps between the project of modernity, colonialism, international law and Chinese reformulations of Sino-Tibetan relations.

## 1:5 Organisation

There are nine chapters in this thesis. Following the introductory chapter, the second chapter presents an overview of the traditional Tibetan legal system and considers Tibet's relations with China in the Yuan, Ming and Qing dynasties. This is placed in the regional context.

Chapter Three explores the changing nature of the frontier in nineteenth and early twentieth century China and Tibet, within the context of European, in particular British, imperial discourse surrounding the nature of civilised and uncivilised society. A key event was the British invasion of Tibet 1904 which marked the beginning of a period of British influence in Tibet, and a corresponding disintegration of the traditional Chinese and Tibetan systems governing international relations. The treaties made between Tibet, China and Great Britain in this era had a profound effect upon perceptions of Tibet's legal status.

Chapter Four considers the impact of the increasing circulation of Western legal values in the region. This Chapter argues that rather than being tangential to and superseded by the era of institutional international law, the 'standard of civilisation' remained central and pervasive, achieving continuity in modernist assumptions of rationality and scientific administration. This places perceptions of Tibet's legal status in historical and comparative perspective.

Chapter Five discusses the relationship between Western imperialism and Nationalist China's attempts to consolidate its territorial sovereignty. During the era of the Nationalist Republic of China (1911-1949), Tibet enjoyed at least *de facto* independence. However, throughout this period, the Nationalist Government of China worked to undermine the legitimacy of the Tibetan government. This chapter considers the legal and ideological means of legitimation employed by both Western imperialism and by Nationalist China in pursuit of territorial goals.

Chapter Six considers the space left for independent Tibetan national identity in a rapidly modernising society of postcolonial states and explores how theoretical



tensions within postcolonial international legal discourse have reinforced an existing lack of consideration for Tibet's legal identity.

Chapter Seven presents an overview of the system of Regional National Autonomy in the PRC, this being the legal framework governing Tibetan Autonomous Areas. An analysis of legislation reveals a tension between the state goal of socialist modernisation and the state protection of Tibetan ethnic difference. A result of this tension is that law is used as a tool to make Tibetan cultural identity compliant to overarching goals of modernisation.

Chapter Eight examines the PRC's efforts to separate Tibetan religious and ethnic identity, a feature of the state's efforts to redefine Tibetan culture in the terms of socialist modernisation. This reveals contradictions within the state's ideological commitment to modernity. It also challenges the official PRC view that present day Sino-Tibetan conflict is a product of British imperial intervention.

Chapter Nine presents an overall conclusion.

## Chapter Two

### 2.1 Introduction

In a letter to Chiang Kai-shek in 1946, the Tibetan government affirmed the ideological grounds of the Tibetan state, outlining the structure upon which its institutions were founded: ‘There have been many great nations on this earth who have achieved unprecedented wealth and might, but there is only one nation which is dedicated to the wellbeing of humanity in the world and that is the religious land of Tibet which cherishes a joint spiritual and temporal system’ (FO371/53616). This brazen assertion of national spiritual superiority is strikingly in contrast with dominant Western models of state structure. Even the more extrovertly ideological of political systems in the West such as communism and fascism have tended to locate the force of political change as a function of the evolutionary progress of universal history, with emphasis placed upon the increased rationality of state administration and the modification of economic relations. In such terms, the Dalai Lama’s statement becomes an expression of faith rather than reason, which is a private not a public matter. The statement is, however, much more than an expression of religious faith. It articulates the conceptual ground of Tibetan law and governance, *cho sid nyi*, ‘the union of religion and politics.’ It projects the combined spiritual and legal power of the state, recalling the preamble to the Dalai Lama Law Code: ‘Like the union of the sun and the moon the priest [the fifth Dalai lama] and the patron [Gushri Khan] together promulgated the legal system in the name of the universal chakravartin emperors [of Buddhist India], and led their subjects towards an age of peace and wellbeing, heralding sunny days of happiness shining from above’ (French 1995a). The purpose of this chapter is to present an overview of the Tibetan legal system and examine the development of traditional Sino-Tibetan relations prior to the emergence of significant Western imperial influence in the region. Such an analysis will show that, whilst Sino-Tibetan relations were complex, Tibet was not incorporated into the traditional Chinese administrative structure. Moreover, Tibet’s distinct legal system provided a very different basis for foreign relations than the one at the heart of the traditional Chinese vision of an empire. The Mahayana Buddhist imperative for the individual to achieve enlightenment for the benefit of all had a fundamental effect upon the rationale

of the Tibetan state. Since, according to this imperative, monasticism was perceived as socially productive, the state had a specific responsibility to support the spiritual endeavours of the nation. Moreover, this imperative defined the role the Tibetan nation played in the world. After all, the cultivation of Buddhism was ultimately directed at achieving liberation for all sentient beings. The ideological conflict between Tibetan and Chinese systems of law and governance that is examined in this chapter is essential to an understanding of the impact of Western imperialism on Sino-Tibetan relations, which will be explored further in later chapters. Of equal importance is the conflict between Tibetan and Western discourses of law and religion. The erasure of Tibetan social theory, including law and politics, from Western studies of Tibet has reinforced the mistaken notion that for all its religious uniqueness, Tibet possessed few or none of the institutions necessary to the modern state.

## **2:2 The Tibetan Legal Tradition**

As far as Tibetan legal tradition goes, the literature that remains is notable primarily by its absence, in either Tibetan or foreign languages.<sup>5</sup> With regard to studies published in the English language, there is only a small body of literature that comprehensively delineates the chronological development of Tibetan law. The majority of references to legal codes, principles and procedures are embedded within studies primarily concerned with other aspects of Tibetan social life, and are therefore not readily accessible. It is apparent that one of the most comprehensive surveys of Tibetan law available, by French (1995a), contains several notable discrepancies in relation to the historical context of Tibetan legal development (Huber 1998). For these reasons, part of this chapter's concern is to draw together some of these disparate threads of information into a cogent outline.

With regard to English language accounts of Tibet and its people, the lack of interest in Tibetan legal institutions runs consonant to the elaboration of the myth of Shangri-La in Western discourse. This is evident in, for example, the Victorian Theosophists appropriation of Tibetan Buddhism through to the contemporary 'new

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<sup>5</sup> In exile, the Tibetan government has established centres of advanced learning such as the research orientated Tibetan University at Sarnath and the Institute of Buddhist Dialectics in Dharamsala, but as a matter of priority emphasis has focused primarily on theological studies. The Library of Tibetan Works and Archives preserves a copy of the Dalai Lama Law Codes, one of which has been translated into English (French. 1995a).

age' superficial fascination with traditional wisdom. In reference to more scholarly work, nineteenth-century Britain saw a considerable collection and translation of Buddhist texts from across the empire, with Buddhism being seen as 'an object determinable...by its own texts' (Almond 1988: 24). The sense of intellectual ownership that pervaded the endeavour created a distance between the texts and the practice, with distinctions being made about what were 'pure' or 'debased' forms of the religion. Tibetan Buddhism ('Lamaism') in particular was presented as corrupt (see, for example, Waddell 1895). This scholarly enterprise fed into a wider imperial discourse in which traditional Buddhist societies were seen as incapable of self-governance. Whilst the historical Buddha was admired by Victorians as a reformer and moralist, and was seen as comparable to Martin Luther, the appropriation of Buddhist texts remained contradictory and fraught by poor translation and incomplete sources.

It has been argued that to some extent this appropriation has been challenged by Tibetans-in-exile who have counter-appropriated the artefacts of Tibetan culture popular in the West in order to reconsolidate Tibetan national identity in Western eyes (Shakya 2001). Yet this in itself highlights the displacement of complex traditional value systems implicated in the operation of the Tibetan state by tokens of exchange that are part of a global circulation of cultural exotica. Such a process of 'mimicry, hybridization, and appropriation of Western representations of Tibetaness or Buddhism among sections of the Tibetan diaspora' is, as Tsering Shakya argues, 'only at the margins of Tibetan subjectivity' (Shakya 2001:185). In this light, it seems that such tokens occupy an uncertain position as vehicles of identity and resistance. This is especially so as modern nationalism widely presupposes that 'secularisation is a prerequisite for the modern state...and the modern state is necessarily an essentially secular state'(Carroll 1984:362). Furthermore, the secular nation has its own 'rituals and monuments' affirming its transcendence by importing 'the sacredness or holiness of its territory' (Fitzpatrick 2007:170).

This returns full circle to consideration of Tibetan law. It is true that dharma is the ultimate law from a Tibetan Buddhist perspective, but this is not the only law that existed within Tibet. The Tibetan legal tradition stretches back to the royal law codes of the seventh-century Tibetan empire. Law codes attributed to King Gampo are preserved piecemeal in later Tibetan histories such as the *Mkha-pa'i dga'-ston* (Uray

1972b:26). More extensive information on early Tibetan law is available from a series of original eighth and ninth-century Tibetan documents from Tunhuang, which deal extensively with legal regulations and attest to a comprehensive, utilitarian legal system that prescribed specific punishments for specific crimes (Huber 1998). Matters pertaining to contract, sales, loans, land holding, taxation and marital disputes are all recorded in the documents, along with examples of correct judicial decisions in accordance with the law. Criminal penalties to be applied in cases of theft are also outlined in detail and it is evident that judges applied the law in a legal forum, and that legal representatives probably assisted those appearing before a judge (Thomas 1933a:101).<sup>6</sup> The most identifiable antecedent of modern Tibetan law (1650-1959) is the Tsang Code, which was disseminated in the early seventeenth century and was the product of an extensive survey of various ancient texts and legal approaches employed throughout the regions of Tibet, Mongolia, Bhutan and Monpa (French 1995a:43). By the time the Fifth Dalai Lama came to power in 1642, the Tibetan legal system had developed into a complex blend of secular (royal) law and Buddhist precepts, the Fifth introducing the system that remained in place until a full administrative takeover by the PRC in 1959.<sup>7</sup> It should be noted that Tibetan law remained in force in Tibet throughout the interim period of dual administration that ensued after the PRC occupation in 1951 and before the 14<sup>th</sup> Dalai Lama went into exile in 1959.

To place the development of Tibetan law in a regional context, at around the same time that King Gampo was reportedly compiling the first law code of the Tibetan empire, the Tang dynasty (618-907) introduced a new and highly influential law code in China. The Tang code of 653 became the foundation upon which all major dynastic law codes were constructed.<sup>8</sup> Furthermore, the Confucian styled Tang code was transplanted into the legal traditions of Korea, Japan and Vietnam, having a significant regional influence (McKnight 1995). The fact that there is no discernible transplantation of Tang law into the Tibetan legal tradition is indicative of the major

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6 One of these documents translated by Hugh Richardson (1990) gives a detailed account of the system of indemnity payments that were the basis of the early law codes.

7 For details of law codes promulgated between the Tenth and Seventeenth centuries, see French (1996), Huber (1998) Ekvall and Cassinelli (1969). Law codes in this era show a continuation of the early codes of the empire with increasing Buddhist influence e.g. the Detsen Code, Neudong Code and the Tsang Code.

8 Previous drafts of the Tang code date from 617, 624 and 637, but the 653 version is held to be the definitive form. A new version was also promulgated in 737.

cultural disparity that existed between Inner Asia and East Asia; a disparity that has had enormous ramifications for Sino-Tibetan relations up to the present day.

As Katz wrote of the field of Tibetan studies in Western academia generally, ‘the ghost of Max Weber still haunts us, his view of Buddhism as one-sidedly otherworldly inhabits our contemporary perceiving’ (Katz 1986:3). In light of contemporary Tibet this remains relevant, for the absence of studies on Tibetan social theory and legal institutions feeds into the PRC’s claim that Tibet has always been part of China. Without the presence of an articulate discourse of Tibetan social theory, what remains is largely the circulation of discourses on Tibetan religious culture.

Yet, from the Tibetan perspective, law/politics and religion were inseparable, the twin pillars upon which Tibetan society was founded. Expressed in Tibetan by the term *cho sid nyi*, this was established as a fundamental principle of Tibetan law and governance from the time of the Fifth Dalai Lama. *Cho sid nyi*, which translates as ‘religion and politics joined together,’ expresses the belief that the ideal government works ‘for temporal happiness in this world and spiritual happiness in the hereafter’ (Wangyal 1975:79). The reciprocal of the notion that the ideal government operated in both the spiritual and worldly domain was the belief that civil society had both spiritual and temporal obligations to fulfil towards the state. The purpose of the laity was, therefore, to subsidise the clergy, whereas the purpose of the clergy was to seek salvation for all sentient beings. The concept was essentially one of reciprocity, ‘a government of dual character and for a dual cause’ (Wangyal 1975:81). Yet from a Western perspective law, as it emerged post-Enlightenment, was its own religion: ‘Faith and belief in the law and its beneficence were, like the language of religion, evoked by jurist after jurist’ (Sugarman 1991:58).

The religious nature of Tibetan law challenges modernity, not just by affronting secular values, but also because the core of its jurisprudence highlights the contradictions of Western law’s claim to autonomy. In Tibetan law, law and morality are seen as contingent. The principles of *res judicata* and *stare decisis* or *jurisprudence constante* did not apply. In Tibetan civil law, judicial decision required the consent of all parties and should consent be lost after a decision was issued, even if years later, then a case could be reopened by either party. In criminal law, the shift towards

institutional Buddhism was given expression in the Fifth's legal reforms which meant that whilst early Tibetan law codes listed specific punishments to fit specific crimes, by the twentieth century there was a reluctance to apply such universal measures (French 1995a:139). This dynamic element is also evidenced in great flexibility in the type and level of legal forum where a case could be heard. During a lawsuit's progress through the judicial system, it could move between levels in a non-linear manner and could likewise be subject to different types of legal procedure, shifting from informal mediation to formal adjudication and back again.<sup>9</sup> As one legal specialist who practised in Tibet prior to 1959 remarked 'The reason for not specifying crime with punishment is that each infraction must be investigated individually in Tibet. This is a method, a process, and not a specific rule' (French 1995a:318).

The jurisprudential concern that this reflects is that the complex web of cause and effect, action and reaction that spans the entire universe has enormous implications for a human understanding of 'truth'. Buddhist jurisprudence stressed the relevance of such concepts as the illusive nature of reality, karma, non-decay, the cyclic existence of rebirth, the non-duality of being, and the existence of multiple concepts of time and causation (French 1995a:59). In a world in which it was perceived that the mind essentially obscured the truth, creating attachments to false beliefs such as the permanence of 'I', a value was attached to 'calming the mind' and attaining a correct view. No action, be it crime or punishment, could be considered in isolation; it could only be understood in the context of karma — the cosmological law of cause and effect.<sup>10</sup> Past causal factors and the future ramifications of an action both had to be taken into account. To prevent the future continuation of a negative effect, it was therefore necessary to unearth, and eliminate, the 'root cause' of a conflict (French 1995a:142-143). As, ultimately, all such root causes lay in the mind, fundamentally subjective factors such as 'attitude' and 'motivation' also played a key role in determining guilt and punishment.

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<sup>9</sup> This is based upon studies of the judicial process in Tibetan courts circa 1900 to 1959 (French 1995a). However, many of the bureaucratic structures described had been in place since 1792 (Carrasco: 1959:83).

<sup>10</sup> A party's awareness of the principles of karma was considered necessary. Judges also had to take karmic responsibility for their decisions. (French. 1995a:63, 161,319).

Determining hidden factors such as the mental attitude of a party to a suit was a task fraught with uncertainties. On the one hand, it was essential for a correct decision and a permanent resolution; on the other hand, ascertaining the attitude that lay behind an action required perspicacity not yet developed by ordinary mortals. After all, it is said that the Buddha, in a previous life, killed a man because he foresaw that the man was going to commit a murder that would result in the death of five hundred people (French 1995a:205). Thus, what on the surface can seem to be a negative action can in fact be a positive deed motivated by compassion. Such stories informed Tibetan legal reasoning in the twentieth century, and underpinned the emphasis placed upon ascertaining motive. They could also invoke a concept of relativism that threatened to undermine individual rights and promote the overvaluation of social tolerance. Hence, when a dispute erupted on a Tibetan estate between a monk and an elderly beggar who relentlessly beat his child, the beggar was able to stall the debate by saying, ‘you may think I am just a common beggar, but how do you know I am not an enlightened saint?’ (French. 1995a:223).<sup>11</sup>

Such concepts pose a challenge to Western legal thought. As French observes, ‘The legal cosmology of Buddhist Tibet brings into question the autonomous framework [of Western law] and most of the basic presumptions we have about the very nature of law, from precedent and *res judicata* to rule-formation and closure’ (French 2001:xiii ). This conceptual opposition between Western and Tibetan jurisprudence is particularly evident in relation to positivist legal theory, which was dominant in the West when Tibet first became a significant object of interest to British India. The British Government of India kept a detailed record of Tibetan law codes and institutions since the British-employed pundit Sarat Chandra Das undertook an intelligence gathering mission to Lhasa in 1881-82 (Das 1895). However, it took over a century for the first full-length study of the Tibetan legal system to appear in Western literature (French 1995a). Even accounting for practical limitations on scholarship such as access and funding, it seems more than coincidental that the Western legal tradition, particularly in its more positivist form, would have great difficulty in accommodating Tibetan jurisprudence as valid grounds for law. Only in these postmodern and postcolonial times have such studies begun to emerge. For practitioners of law in nineteenth-century England, the willingness of the Tibetan

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<sup>11</sup> Truth could be further ascertained through the use of oaths, oracles and ordeals (French. 1995a:130, Ekvall.1963).



system to accommodate such a wide array of contingent factors and narratives would have led to a destruction of law itself: 'We are perpetually in danger of giving law a literary instead of a scientific character, and of slipping in our thoughts from what the law is into speculating upon the coincidences which made it what it once was.'<sup>12</sup>

The Tibetan system would not have it so, for 'rationality' is itself a position that must be open to critique. The Buddha, in the *Brahmajala Sutta* of the Pali *Digha Nikāya*, criticised mimamsika Brahmin practitioners of the rationalist school by highlighting that their rational arguments masked their economic self-interest in perpetuating a certain system of beliefs. Buddha argued that 'rationality is far from a *sui generis* phenomenon' (Katz 1983:9). This view was developed by Candrakirti, the seventh century abbot of Nalanda University and scholar of primary significance in the Tibetan monastic curriculum, who concluded that 'no position could be neutral in principle,' that affective passions 'ultimately rooted in egoistic ignorance, determine a position to be an expression of self-interest rather than an enquiry into truth,' and 'it is only in the absence of self-interest that an objective or neutral claim could be made' (Katz 1983:9).

### 2.3 The Tibetan Administrative System

It is often said that Tibet was a theocratic state governed by monks. In fact, technically Tibet was not a theocracy, and neither did monasteries have a significant formal role in the central government.<sup>13</sup> The leading abbots of the larger monasteries around Lhasa did have places on the Full National Assembly, but this was essentially only a consultative body that assembled infrequently at the request of the Cabinet (Goldstein1989:19-20). The assembly had neither the power to initiate action, nor to fix a course of administrative measures. The monasteries did, however, exert considerable informal influence over political affairs, in which they maintained considerable interest.<sup>14</sup> Indeed, this was made explicit in the annual Mon Lam (Great Prayer) festival, when monks took over the capital of Lhasa for a period of three

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<sup>12</sup> Frederick Hanson, Professor of Jurisprudence at the Inns of Court, 1879, cited in Sugarman.1991:51.

<sup>13</sup> Tibet was not a theocracy because the Dalai Lama is a direct incarnation of his human predecessor and only an indirect incarnation of the Bodhisattva Avalokitesvara. Stein.1972:138-139.

<sup>14</sup> See, for example, the Toba Abbot incident (Goldstein.1990: 243, Goldstein.1989:365).

weeks. During this time, secular legal control was suspended, and instead legal authority was transferred to the monasteries (French 1995a:47, 180-181).

Additionally, when the Tibetan state gave institutionalised religion priority, even if monasteries did not have a formal role in government, individual incarnate lamas did, of which the Dalai Lama was the most important. The nobility, meanwhile, was potentially in conflict with the ecclesiastical elites, as both competed for representation in the political arena. To a certain extent, this meant that the two institutions operated as a check and balance to each other, but on the other hand the accountability of both to civil society was relatively negligible. Furthermore, Goldstein has shown that the system of ennobling the families of important incarnations led to a circulation of property that ultimately favoured the ecclesiastical community, for it was the nobles' property that was confiscated and redistributed to meet these ends (Goldstein 1973). Consequently, a distinct tension between secular and religious objectives remained. This tension was reflected in the legal system, with one significant primary source of written law relevant to a study of Tibet's legal tradition being *tsa-yig*, which outlined the fundamental governing principles and institutions of a monastic community. To date, little research has been undertaken into these documents, despite the fact that considerable attention has been paid to the evolution of monastic power in Tibet. Given the obvious impact that Tibetan monastic institutions had upon the administration of the entire polity, this signifies a considerable gap in the understanding of Tibetan law and governance. As Ter Ellingson points out, this is a gap with significant ramifications, given '...the extent to which Tibetan monasteries are still widely characterised as mysterious enclaves of 'priests,' Rasputin-like powers behind thrones, and hordes of ignorant fanatics who periodically and inexplicably march forth to topple governments' (Ellingson.1990:206). Challenging these widely held presumptions, the *tsa-yig* clearly established a constitutional framework designed to prevent the arbitrary abuse of power within monastic communities. Essentially, the *tsa-yig*, by distributing authority among a range of offices and institutions, provided a framework for an interactive and accountable system of monastic governance in which each individual had veto rights over important policy matters. To give some insight into the social significance of the *tsa-yig*, from approximately the seventeenth century through to 1950, monks comprised about one fifth of the entire population, a greater proportion than in any

other Buddhist society. Sera monastery, for example, was one of three ‘great monasteries’ in Lhasa, and by the end of the nineteenth century was home to between seven thousand and ten thousand monks (Stein 1972:139). Monks were not averse to more aggressive expressions of their political will. They frequently exerted this influence to great effect, opposing, for example, the Thirteenth Dalai Lama’s proposed expansion and restructuring of the Tibetan Army, which was perceived as a threat to monastic power (Goldstein.1989:Ch3). Connected to this is the fact that the Great Monasteries had their own large populations of errant fighting monks, *dobdos*, who were generally not accountable for their actions (Goldstein, Siebenschuh & Tsering 1997:27-29).<sup>15</sup> As Goldstein states, ‘Monasticism in Tibet was not the otherworldly domain of a minute elite; rather it was a mass phenomenon’(Goldstein 1990:231). Tibetan customary law specified that each family should give over their third son to monastic life.<sup>16</sup> This meant that a representative from nearly every household in the polity exerted some influence over monastic governance.<sup>17</sup>

By the end of the nineteenth century, at least one half of all government officials were monks (Goldstein.1989:8). Monks had played an important political role as ministers, ambassadors and mediators from the time of the ninth century, although the systematic appointment of monk officials seems to derive from positions first created by the Fifth Dalai Lama (Stein 1972:143 and Goldstein 1989:8). Monk officials were, however, trained very differently from other monks, and their positions were not dependent upon their having risen through the monastic academic examination system. In fact, monastic officials had only cursory religious training, and in the twentieth century were typically literate members of the middle classes who took the requisite monastic vows upon entering office simply to further their career(Goldstein.1989:8, Macdonald.1929:56). This was necessary, because lay officials were exclusively drawn from the nobility. Despite being obliged to take a vow of celibacy, monk officials lived similar lives to their lay counterparts, occupying houses in the city rather than monasteries, and working on day-to-day government

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<sup>15</sup> However, cases from the districts suggest that litigation could be brought against errant monks. (French.1995a:93, 278-290). For details of the overlapping rights of clergy and laity in family law, see Stein.1972:98.

<sup>16</sup> See King Trhisong Detsen’s law-code (Stein.1972:98) This remained the custom among agricultural communities of the twentieth century (Carrasco.1959:47).

<sup>17</sup> The scholastic education of monks, in particular their training in the art of debate and formal logic, gave them the capacity to act in external legal fora. However the impoverished lower clergy did not necessarily achieve literacy. Stein.1972:140.

administration rather than engaging in religious rites and prayer ceremonies (Goldstein, Siebenschuh & Tsering 1997:27). They operated in a predominantly secular domain, without affiliation to any monastery, and were subject to a series of official regulations designed to prevent the arbitrary use and abuse of power, and which provided an avenue of complaint for citizens seeking redress (French 1995a:233-235). For these reasons, monk officials were known as ‘token monks’ (Goldstein, Siebenschuh & Tsering 1997:27). Thus, whilst it can be said that monk officials operated half of the administration, monasteries had little formal control over governmental affairs. For this reason, whilst Buddhism has a notably egalitarian form of social philosophy, this philosophy was never fully realised in political Tibet. Yet, for all this, Buddhism had an enormous impact upon Tibetan life, and monasticism fostered a level of sophisticated scholarship and philosophical debate that had no secular counterpart.

#### **2.4 Tibetan Relations with the Mongols**

The phenomenon of mass monasticism evolved following the collapse of the Tibetan empire at the end of the ninth century. The expansion of monasteries, following the model of Indian monastic universities, ensured rapid scholastic progress. When Genghis Khan entered Tibet in 1206, seeking the country’s submission, Tibet resisted on the basis of religious rather than military power. A special relationship was established between Genghis and Kunga Dorje, the hierarch of the Sakya, then the most powerful Buddhist sect in Tibet. This relationship was conceptually founded upon a principle of Buddhist theory which defined the ideal relationship between the priest/preceptor on the one hand, and the lay donor on the other (Seyfort Ruegg 1991). In Tibet, this type of relationship was expressed by the term *cho-yon*, and entailed the Buddhist preceptor bestowing spiritual protection upon the donor. In return, the donor was obliged to provide physical protection to the preceptor. In the context of Buddhist theory, the preceptor, as a bearer of dharma, was the superior. From the Tibetan point of view, Tibet was the centre of Buddhist civilisation, and as such, an agent of spiritual transformation in the world. The *cho-yon* relationship therefore became overlaid with geopolitical considerations. What began as a concept relating to a personal relationship between guru and disciple, developed into a notion that expressed Tibet’s national status. When Mongol Khans, and later Qing emperors, entered into *cho-yon*

relationships with Tibetan rulers, they were placing themselves under an obligation to protect not only the individual lama, but also that lama's subjects (Goldstein 1989:44, Shakabpa 1967:61-72).

The cho-yon relationship was continued by the sons of Genghis and the Sakya-pas. In either 1253 or 1260, Kublai Khan granted the Sakya-pas temporal authority over all Tibet's 'thirteen provinces' (Stein 1972:78). The Sakya went on to exert administrative control over Tibet for the rest of the thirteenth century, an arrangement that granted Tibet a considerable degree of autonomy from the Mongol empire.

During the reign of Kublai, the Mongol empire was at the height of its power. It stretched from Korea, in the east, to the Mediterranean Sea in the west, and from Vietnam, in the south, to Siberia in the North. Genghis had conquered Yanjing in 1215, and his sons had secured northern China by 1241. It was Kublai, however, who succeeded in ousting the Chinese Sung dynasty from south China in 1279, after moving the Mongol capital from Mongolia to Beijing (then known as Dadu) in 1271, and assuming the dynastic title of Yuan. The Mongol Yuan dynasty ruled China from 1271 to 1368 and Chinese historians have since claimed that the legitimacy of PRC rule in Tibet originates in the events of this period. The official PRC history of Tibet, for example, states that 'Tibet was officially incorporated into China during the Yuan Dynasty' (Wang and Nyima 2001:20). Apart from the significant question of whether the modern Chinese state can derive legal title or obligation from a Mongol empire which temporarily colonised Chinese territory, the validity of this claim is undermined by the fact that Mongol officials did not directly administer Tibet. Furthermore, the period in which the Khans exerted influence over Tibet was not coterminous with the time during which the Yuan dynasty ruled China. In 1354, over a decade before the end of Yuan dynasty, control of Tibet was seized by the Tibetan former monk 'Great Situ' Chanchub Gyalsen, who promulgated the Neudong Law Code and founded the Phagmotru-pa dynasty (Stein.1972:79-80, French.1995a:43).<sup>18</sup>

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<sup>18</sup> It remains uncertain to what extent Mongol law was transplanted into Tibet during the reign of the Sakya-pas (Huber.1998:86, French.1995a:42 and French.1996:316, 445-446).

## 2.5 Tibetan Relations with the Ming Dynasty

In China, the Ming Chinese dynasty overthrew the Yuan dynasty in 1368, reinstating Confucianism as the state ideology. Accordingly, the vibrant legal culture of the Yuan was thoroughly replaced, and a revised and expanded version of the preceding Confucian-styled Tang code was disseminated in 1373. State sponsored scholars turned to the classics for guidance in composing a theory of statecraft that would reinforce the dynasty's claim to legitimacy. This marked the beginning of a systematic attempt to 'reassert the validity of the Confucian view of China's place in the world' (Wang 1968:34).

The system of foreign relations that was implemented by the Ming fell within the overarching ideology of the tribute system. The origins of the tribute system can be traced back to the period of the Warring States when Confucian philosophers first popularised the terminology, later to become central to the language of imperial diplomacy. Of particular note is the division of the world into superior Chinese and inferior barbarians, which became the convention at this time (Yang 1968:21). Also significant is the identification of the ruler as the Son of Heaven, to whom barbarians 'offered up' tribute. This formulation projected the same hierarchal Confucian ethos that had proven so successful in regulating domestic society onto international society. Theoretically, this placed the Chinese emperor, the Son of Heaven, at the apex of the moral order, not only in China, but in the entire world. By manifesting Confucian virtue (te), the emperor received the mandate of heaven, mediated between heaven and earth, and inspired the barbarians to come to court and be transformed (lai hua). This view is exemplified in the statement of the Han dynasty Confucianist Hsieh Pi : '...[I]f a Son of Heaven acts according to filial piety, the barbarians of the four directions will become peaceful; nothing but filial piety can save the borders...' (Suzuki 1968:181).

The Ming efforts to establish relations with Tibet began almost as soon as the dynasty had consolidated their rule over China. Whilst Tibet did not pose a significant military threat, in the post-Yuan period, the Mongols did, and the possibility of a Tibetan-Mongol alliance caused anxiety. Furthermore, tension between the Mongols and the Ming put a halt to the horse trade between China and Mongolia, precipitating a

crisis at the court.<sup>19</sup> It was imperative that the Ming establish new trade routes, and Tibet was a primary alternative source (Sperling 1980:280).

In 1369, Emperor T'ai-tsu sent the first Ming mission to Tibet, which according to Chinese records met with failure. Subsequent missions met with more success in Tibetan frontier areas, and Ming records, in conformance with Confucian ideology, chronicled several Tibetan 'tribute' missions to the Ming Court. Additionally, the Ming court bestowed titles and seals on several Tibetan hierarchs. That these 'tribute' missions were in fact trade missions, and the title bearers those Tibetans who facilitated this trade, has since been clearly shown through careful analysis of Ming and Tibetan records (Sperling 1983).

The fact that the lofty rhetoric of the Chinese tribute system disguised a much more prosaic system of trade relations has been well documented (Fairbank and Teng 1941, Fairbank (ed.) 1968). The first Ming Emperor had been quick to ban all private overseas trade, and prohibited citizens from having contact with foreign traders, using foreign commodities, or travelling overseas (Chan 1968:414). This ensured that the official tribute system was the only legal way of conducting cross-border trade in Ming China. Foreign envoys were admitted only as tributaries and conducted their trade under close surveillance, hence restricting their interaction with Chinese civilians. The emperor, meanwhile, was able to ensure that the court received a steady flow of goods and, furthermore, was able to reinforce the legitimacy of the dynasty's reign at home by fostering the myth of Chinese superiority abroad. As Fletcher (1968:209) points out, 'Chinese subjects met no foreigners who were not also 'subjects' of the realm: no living challenge to the ruler's claims walked the streets of the Middle Kingdom.'

This was the ideal, but the system was not without its faults. Firstly, in order to persuade foreign envoys to trade through official, rather than black market channels, the court had to offer various incentives.<sup>20</sup> These incentives included the court bearing the full cost of the tribute mission's journey within China's borders. This, alongside the 'gifts' given by the court in exchange for the 'tribute,' frequently meant that the

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<sup>19</sup> Ming records show that the emperor sought horses from as far afield as the Ryukyu Islands (Sperling.1983:344).

<sup>20</sup> Despite the threat of the death penalty, Chinese merchants operated large scale horse smuggling operations, flooding Tibetan markets and destabilising Ming attempts to control the exchange rate (Sperling.1980:281).

court suffered a loss (Sperling 1983:352). Indeed, after the horse crisis had subsided, the cost of tribute missions from Tibetan lamas was considered too much of a burden upon the court and relations were curtailed (Wylie 1980:335). To some extent, costs could be justified by the argument that returning tribute missions would glorify the Celestial Court abroad. This appeared to be particularly successful in the South East Asian countries that adopted Chinese cultural values. Korea, for example, had already embraced aspects of Tang law, and continued to have a close relationship with the Ming and Qing dynasties, fully accepting its inferior 'tributary' position in accordance with the Confucian hierarchy. The situation in Central and Inner Asia was not so stable and the court's arrogance in adhering to the Confucian ideology was a source of ridicule, and even conflict (Suzuki 1968:184, Fletcher 1968: esp.209-215).

This underlines the difficulties faced by the Chinese court. Confucian orthodoxy had facilitated the dynasty's rule within China, but the gap between Confucian ideals and the competing heterodox values of 'barbarian' societies still needed to be bridged. In fact, the tributary system had been developed precisely for this purpose; it was a way to neutralise, and accommodate, the potentially disruptive effect of non-Confucian peoples, without diluting the superior Confucian values of Chinese civilisation.<sup>21</sup> It became clear, however, that there were times when the court would need to deviate from the orthodox tribute rituals if it were to maintain good relations abroad. This meant that, despite the external veneer of Confucianism, behind the scenes the court could prove unexpectedly accommodating to competing philosophies. This deviation from ritual occurred at various times throughout Ming and Qing history, and is well documented in court dealings with Muslim Central Asia, imperial Russia, and imperial Britain. It was also a significant feature of Sino-Tibetan relations, a fact evident in the unorthodox interaction of Confucian emperors and Tibetan Buddhist dignitaries.

Buddhism had been established in China by the year 64, but in its development became split from Tibetan Buddhism, which more closely followed Indian Buddhism. Despite the fact that the first Ming Emperor placed Confucianism at the heart of his state-building project (and established a Confucian bureaucracy that

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<sup>21</sup> 'Barbarian' is a translation of the Chinese term generally used to denote foreigners. For further discussion see Fairbank and Teng, 1941:137.



remained in place until 1911) before his rise to power, the emperor had been a Buddhist monk. He continued to be interested in Buddhism throughout his reign, retaining Buddhist monks at his court and obtaining important scriptures from Tibetan lamas. Nevertheless, he was astute enough to limit the political power base of Buddhists within China.<sup>22</sup> This illustrates the complex, and often contradictory, relationship between Confucianism and Buddhism in China. Although Buddhism and Confucianism were not always in conflict, in fact, Confucianism came to incorporate Buddhist concepts in much the same way as it incorporated elements from Legalism and Taoism, the Confucian state was frequently wary of Buddhist institutions. Periodic suppressions of Buddhism occurred from the Tang dynasty onwards, and both the Ming and the Qing placed institutional limits on Buddhist organisations and monasteries in China (Goossaert 2000: 41-42, Lee 1977-1978:1322-1325). Whatever the private spiritual inclinations of Chinese emperors, Buddhism remained a potential threat to the legitimacy of the state. Chinese Buddhism, by cultivating an ethic of non-attachment, envisaged a largely autonomous religious community that had cut its ties to state and family. This had political implications that were attractive to a gentry class seeking autonomy from the Confucian elite, but was profoundly unsettling for the state (Brook 1993). Whilst Buddhism, especially Mahayana Buddhism, taught social responsibility, in China 'loyalty to the Buddha was incompatible with the Confucian and Legalist ideal of 'one king, one ideology' (Lee 1977-1978:1322).

China had its own distinct form of Buddhism, meaning that Tibetan Buddhism occupied an uncertain position there, Confucian rivalry notwithstanding. Yet, this did not preclude genuine interest in Tibetan teachings, particularly as Chinese rulers were at times worried about the degeneration of Buddhism in China (Sperling 1980:283). For example, the third Ming Emperor, Ch'eng-tsu invited the Tibetan hierarch the Fifth Karma-pa to his capital, an event recorded in the Ming-Shih (Sperling 1980:283).

Despite the religious nature of the Karma-pa's visit, there are still political considerations to be taken into account. The Mongols remained a constant threat to the Ming, and this meant that the dynasty could not overlook the potentially pacific effect

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22 The Ministry of Rites was responsible for examining and certifying all Buddhist priests (Hucker.1958:35).

that their patronage of Tibetan Buddhism might have. It is perhaps for this reason that Emperor Ch'eng-tsu proposed an alliance with the Karma-pa based upon the cho-yon principle. The Karma-pa, despite giving teachings to the emperor, rejected this proposal, and the Ming subsequently failed to establish any meaningful relationship with Tibet. This was especially so after the Ming Emperor Shih-tsung (1522-1566) came to the throne, who 'embraced Taoism, degraded lamas, and suppressed Buddhism,' and the Ming-Shih records show from this time on 'Tibetan lamas rarely went to China' (Wylie 1980:338).

Instead, Tibetan lamas turned towards the Mongols and in 1578 a new cho-yon alliance between the powerful Tibetan Buddhist Gelug-pa sect and Altan Khan gave rise to the institution of the Dalai Lama. In 1642 Gushri Khan sponsored military intervention on behalf of the Fifth Dalai Lama, giving him authority to rule Tibet in its entirety (Stein 1972:81). The 'Great Fifth' was the first Dalai Lama to gain spiritual and temporal rule over the country, and was responsible for consolidating the legal, religious and political institutions that were the foundations of modern Tibet prior to 1959 (Stein 1972:84-85). A new Tibetan law code was circulated under the influence of a Mongol nominated governor, and later revised when the Fifth Dalai Lama appointed his own governor.<sup>23</sup>

## **2:6 Tibetan Relations with the Qing Dynasty**

Not long after the Fifth Dalai Lama gained control over Tibet, the Ming dynasty fell to the Manchu Qing dynasty, which gained control of China in 1644. Before the conquest, the Manchus, an Inner Asian people, had been in contact with the Gelug-pas through the Mongols. Whilst the Manchus had cultural characteristics in common with the Mongols, the early Manchu interest in Tibetan Buddhism had significant political motives; by giving respect to Tibetan Lamas, the Manchus hoped to win the assistance of the Mongols in the invasion of Ming China. At the same time, the Manchus, like the Ming, turned towards Confucianism in order to facilitate their takeover of China. Thus, once in power, the pre-existing Confucian civil service was

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23 French. 1996:448, Das.1904:228 As much as one-third to a half of the first code replicated the Tsang Code. The influence of the earlier Neudong code has also been detected. French suggests that both codes remained current, although other evidence refutes this (Macdonald.1929:60, Huber.1998). The second Dalai Lama Code exists as a Tibetan manuscript held at the Library of Tibetan Works and Archives, Dharamsala.

retained, and in 1646 the Ming penal code was transplanted into an expanded Qing Code. By adopting the trappings of Confucianism, the Manchu Emperor was able to claim the mandate of heaven. To successfully take his place at the apex of the moral order, the emperor was required to act according to Confucian rules of propriety and deal with foreign barbarians according to the tribute system.

This left the problem of how to effectively deal with the conflicting cultural values of the dynasty's Inner Asian allies largely unresolved. It was imperative that the Manchus avoid hostilities on the northern frontiers if they were to be free to consolidate power in China. Even more so than in the Ming, it was clear that the Confucian system would not suffice. To deal with this conflict of interests, the Qing established a special administrative department, the Lifanyuan, to manage Inner Asian relations, dividing the diplomatic system into two. Customary relations with the east and south, including the maritime nations of Europe, continued to be dealt with under the orthodox Confucian rubric of the Reception Department, under the Board of Rites (Fairbank and Teng 1941:158). Meanwhile, Inner Asia, and later Russia, were dealt with according to a different set of rituals. The significance of this dual approach was not initially acknowledged in the literature dealing with the Qing tribute system. In part, this is because Qing historical records tended to be the products of Confucian scholarship. As scholars and officials sought to locate the present within the context of a distinctly Confucian tradition, this led to a glossing over of troublesome contradictions. Moreover, Manchu emperors could not afford to alienate Chinese Confucian elites, such as the influential culture of Ching I, and so sought to portray their rule within China in Confucian terms (Eastman 1965). Thus, the Kangxi edition of the Hui-tien explained that the newly established Lifanyuan had been created to deal with an overwhelming tide of people flocking to the court to admire the new dynasty's great virtue (Fairbank and Teng 1941:159). Yet, behind a screen of orthodox Confucianism, like their Ming predecessors, the Qing emperors dealt with Central and Inner Asia on very different terms. As Fletcher concludes:

‘Within the empire, the myth of world suzerainty was a useful ideological instrument for ruling China...But in foreign affairs the myth often proved a hindrance. Then, quietly, the emperor practiced what he pleased, not what he preached. Relations on an equal basis with Heart, Lhasa, Kokand, or Moscow were not exceptions to Chinese practice at all. They were customary

dealings on the unseen side of a long-established tradition.’ (Fletcher 1968:224).

Formal Qing-Tibetan relations began not long after the Manchus came to power. At the suggestion of the Mongols, the first Qing Emperor invited the Dalai Lama to Manchuria before the invasion of China. However, a meeting between the two rulers did not take place until after the conquest in 1652, when the Dalai Lama, accompanied by a retinue of 3,000, finally visited Beijing (Rockhill 1998:9-11). This visit is significant in that it highlights the difficulty that the new emperor faced in reconciling the competing cultural interests of the Buddhist north and Confucian south. His Manchu advisors, mindful of the necessity of pacifying the Mongols, advised the emperor to receive the Dalai Lama at his court. The emperor’s Han Chinese advisors, meanwhile, insisted that the Dalai Lama should not be permitted to cross the Chinese border (Rockhill 1998:11). In the event, the Dalai Lama proceeded to Beijing, where he was treated with the ceremony befitting an independent sovereign (Rockhill 1998:15, Bell 2000:36). The Dalai Lama gave spiritual teachings and afterwards the two rulers exchanged titles. The Dalai Lama received the title ‘The Unifier in one religion of the people living in the extremely healthy, tranquil, and celestial land of the west, the immutable Vajradhara, the Ocean of Wisdom’ (TMC 2001:17). The emperor, meanwhile, received the title ‘The Heavenly Lord Manjushri, the Great Emperor’ from the Dalai Lama (TMC 2001:17). The title was significant, as it identified the emperor as the incarnation of the Bodhisattva Manjushri, a very important figure in Tibetan Buddhism. Nonetheless, such a title did not grant the emperor sole rights to a Manjushri identity, as such titles could be given to more than one individual simultaneously (Uspensky 2002:218). The title was appropriate, as in Buddhism the Bodhisattva Manjushri had long been identified as a protector of China (Farquhar 1978:13, Manandhar and Mishra 1986:1).

The bestowal of titles had been an integral part of the Confucian tribute system since earlier dynasties. As previously noted, Tibetan hierarchs received titles from the Ming as part of tributary-trade relations. The rulers of Laos, Korea, Annam, Burma, and Siam also received complimentary titles and seals from the Ming, and continued to do so under the Qing. The ritual of title giving underlined the emperor’s authority, but also his supreme benevolence and virtue. Theoretically, the barbarians

coming to court were attracted by superior Confucian civilisation, and were there ‘to be transformed.’ Thus, title-giving symbolised the successful, and harmonious, incorporation of the uncivilised into the civilised world. The Son of Heaven, the ultimate patriarch, henceforth treated the tributary countries as his subordinates, as a Confucian father might his sons. In Western scholarship, this has led to the tributary countries being labelled as ‘vassals’ of China, although such a Sinocentric interpretation fails to account for the complex system of regional relationships that operated beyond the traditional Confucian world view.

Commentators have since attributed great significance to the fact that Tibetans received titles from Chinese emperors. Li, for example, has claimed that ‘hereditary titles tended to consolidate Chinese power by their psychological effect upon the Tibetan mind’ (Li 1960:28). This view originates from the constructions of traditional Confucianist historiography. Yet, studies of the tribute system have clearly shown the disparity between Confucian ideals and diplomatic reality. Even more problematic is the fact that the exchange of titles between Qing emperors and the Dalai Lamas was reciprocal. This reciprocity transformed the Confucian basis of the ritual. From the Tibetan point of view, meanwhile, this signalled not only a suspension, but an inversion of the Confucian hierarchy. According to the principles of cho-yon, the Fifth Dalai Lama had accepted the emperor as his donor-patron. As he had already entered into cho-yon relations with Gushri Khan in 1642, this meant that the Fifth Dalai Lama now had two powerful donors to whom he acted as preceptor, a fact that greatly enhanced the legitimacy of his rule in Tibet. In China, the concept of lai hua, ‘come and be transformed,’ implied that the barbarians could not help but be drawn to Chinese civilisation (Fairbank 1942:132). In Tibet, meanwhile, it was accepted that the Tibetan state, by privileging monastic education over military might, was working towards the enlightenment of all sentient beings.<sup>24</sup> The fact that Tibetan lamas had successfully established the dharma at the Manchu court was evidence of the greatness of Tibetan civilisation and, ultimately, this demonstrated the superiority of the dual system.

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<sup>24</sup> In Tibet monks represented 13% of the population, and about 26% of the males (Goldstein. 1990. p231).

Certainly, the Fifth Dalai Lama had little reason to doubt his influence. In Tibet, increasing trade and scholarship ensured rapid advancement (Stein 1972:84-85). Meanwhile, in the early reign of the Kangxi Emperor (r. 1661-1722), Mongol chiefs were received at the Qing court as vassals of the Dalai Lama, and the Dalai Lama helped mediate in Qing-Mongol disputes (Rockhill 1998:17-18, Wang 1995:20). Tibet, therefore, had a persuasive and compelling regional influence at this time. Indeed, in 1674, the Dalai Lama refused the Qing emperor's request for military aid when China was beset by internal revolts (Shakabpa 1984:120-121).

Nevertheless, in 1720, the balance of power underwent a dramatic shift. Following internal unrest, certain factions in Tibet appealed for military aid from the Dzungars to help them defeat Lhabsang Khan, who had attacked Lhasa on the pretext that the Sixth Dalai Lama should be deposed due to his predilection for women and love-poetry (Stein 1972:85). This intervention backfired, leading to the massacring of numerous Tibetans. In the early eighteenth century the Dzungars, the last of the nomad empires of Central Asia, competed for regional power alongside imperial Russia and China and represented a threat to Manchu rule (Barfield 1989:266-296, Perdue 1996:757-793). When Tibet appealed to China for support Qing troops entered Lhasa and expelled the Dzungars. In the process, however, the Qing army also annexed part of eastern Tibet and installed a small garrison at Lhasa, which operated under the authority of two Ambans. This marked the beginning of the Chinese protectorate, which remained in place until 1911 (Stein 1972:85, Petech 1950: esp.8-77).

Emperor Qianlong finally defeated the Dzungars in 1757, and the Mongols too were soon subdued through a Qing policy of divide and rule (Barfield 1989:294). In the process, Tibet lost strategic relevance to the Manchus, but the patronage of Tibetan Buddhism still remained an essential tool for avoiding conflict in Mongolia. The two Ambans in Lhasa remained at their post, keeping the lines of communication open between the two governments. During this time, the Tibetan government took charge of its own foreign affairs. In 1770, Tibet closed its borders to Nepal as a protest against debased coinage that contravened a 1650 treaty between the two countries (Rose 1971:13-15). In 1772, Tibet sent military aid to Sikkim following a Bhutanese invasion, an event that brought Tibet closer to the British, due to conflict between

Bhutan and the Rajah of Kuch Bihar. Subsequent Tibetan mediation brought about the first treaty between the British and Bhutan in 1774.

The dispute between Tibet and Nepal reignited in 1775 resulting in a new treaty. This reaffirmed a provision of the 1650 treaty which stipulated that Tibet must close its Himalayan trade routes to all countries except Nepal. Tibet violated this treaty almost immediately by opening up new trade routes in the Chumbi valley sparking a war between the two countries in 1788. In the resulting settlement Nepal gained extraterritorial rights in Tibet and installed an envoy at Lhasa. Tibet also agreed to pay an annual tribute to Nepal.

Of particular significance is the fact that at the same time Nepal was collecting tribute from Tibet, Nepal was paying tribute to the Qing Emperor (Edwards 1987:35). This underscores the independence of all three parties. It also highlights the complexity of the tribute system in Asia. Studies of the Chinese tribute system have encouraged the view that the institution emerged from, and was ultimately controlled by, the Beijing court. Research that has unearthed deviations and inconsistencies within the Chinese tribute system have certainly challenged perceptions of Chinese hegemony, but the fact that China was not an exclusive recipient of tribute has seldom been noted. Whilst both Nepal and Tibet paid tribute in Beijing, they also maintained separate tributary relations with surrounding states. Nepal succeeded in securing tribute from Tibet. Tibet, meanwhile, received tribute from Bhutan and Sikkim, and held them to be Tibetan dependencies. Ironically, Bhutan objected to the Tibetan classification, insisting that it only presented 'gifts' to the Dalai Lama in his capacity as a religious rather than political leader (Rose 1977:60). Tibet, however, insisted that Bhutan was its political subordinate and invaded Bhutan several times during the seventeenth and eighteenth centuries, but only succeeded in gaining actual political influence for short intermittent periods (Rose 1977:59). The tributary relationship of Tibet and Bhutan is significant in that the PRC later used it as a basis for claiming control over Bhutanese territory (Belfiglio 1972:683). What was crucial about this claim is that Bhutan had never entered into tributary relations with an emperor of China. During the period that Lhasa was accepting missions from Bhutan, tributary or otherwise, Qing archives record no Bhutanese tribute missions (Rose 1977:60).

The Nepal-Tibet conflict erupted again in 1791. Tibet's military was soon struggling to defend the country and it was clear that Lhasa would have to involve its Manchu donor-patron. The hostilities provoked a clear reaction from the Qing court, and clearly not for altruistic reasons. Rose, in his analysis of official Nepali, Chinese and Tibetan documents concludes that:-

‘The Nepali invasions of Tibet in 1788 and 1791 were not merely conflicts between Nepal and Tibet, nor were they only raids at the seizure of loot. More fundamentally they constituted an intervention in Tibetan politics and an attempt by the Gorkhalis to support those Tibetan political factions whose interests were, temporarily at least, most closely aligned with those of Nepal. Kathmandu may even have harboured the hope of replacing the [Qing] dynasty as the nominal suzerain of Tibet, at least for Tsang and the Western Tibetan districts’ (Rose 1971:36).

This is significant, for despite the fact that the Qing had no direct economic or military interest in Tibet, the Manchu rule over the Mongols was still potentially precarious. The emperor thus issued a statement reiterating that the dynasty could not afford to lose its interest in Tibet, and that ‘Nepal would have to be taught a lesson it would remember for all time (Rose 1971:54). The emperor dispatched a military mission to aid Tibet, and a letter to the British Governor general demanding that the British punish the Gurkhas, stating that ‘it behoves the Rajahs of all the adjacent countries to obey my commands’ (Rose 1971:56). The British, however, did not accept commands from the emperor, and in fact signed a commercial treaty with Nepal not long after, an event that led the Qing to suspect British-Nepali collaboration in the invasion (Bell 2000:45). The British did offer to mediate between Tibet and Nepal, but by the time the British delegation arrived a peace treaty had already been concluded.

The treaty was favourable to China, stating that both Nepal and Tibet had tribute obligations to the emperor. Under its terms, Nepal was required to send a quinquennial tribute mission to China, whereas China promised to protect Nepal from foreign incursion. Meanwhile, alarmed at the fact that certain factions in Tibet had collaborated with the Gurkhas, in 1793 China pushed through reforms in the Tibetan administration designed to protect Chinese interests in the country. The emperor made clear that he would withdraw his protection of the Tibetan government if they did not accept the reforms, and stated that the Qing would not involve itself in such conflicts in the future (TMC. 2001:63). As a result, the power of the two Chinese representatives in



Lhasa increased significantly. Qing dynasty regulations for the Lhasa Amban of this period state that:-

‘The Amban will consult with the Talé lama [Dalai Lama] or Panch’en Rinpoche’<sup>25</sup> [Panchen Lama] on all local questions brought before them on a footing of perfect equality. All officials from the rank of Kalon down, and ecclesiastics holding official positions, must submit all questions to him for his decision.’ (Rockhill 1891:7).

The regulations laid down the Amban’s responsibilities regarding frontier defence, the collection of revenue, finance and trade. The regulations also state that the Amban is responsible for filing any indemnity payments arising from formal adjudication in ‘Anterior or Ulterior Tibet’ (Rockhill 1891:11). Furthermore, the Amban reserved the right to investigate and decide cases ‘where doubt exists as to the exact nature of the crime,’ although, ‘with the above exception, the native judges will judge all crimes according to justice, but they are not permitted to order of themselves confiscations’ (Rockhill 1891:11). For the first time there is evidence that China influenced Tibetan law.

Nonetheless, it was not long before the Qing court had lost what power it had gained. In 1793, the Qing dynasty was at the height of its economic and military power, and the court could well have been optimistic about extending its influence in Tibet. However, expensive campaigns and lavish expenditures had taken their toll, and by the time the emperor had crushed the White Lotus Rebellion of 1796-1804, it was clear that the Manchu’s could not afford to divert resources away from their own increasingly turbulent internal affairs. This ensured that the reforms were on paper only (Rose 1971:65). The subsequent withdrawal of the Manchus from Tibet is evident in the failure of the Qing court to intervene in the Ladakhi invasion of Tibet in 1841.<sup>25</sup> Then, in 1855, the third Nepal-Tibet war erupted, as Nepal sought to regain rights lost under the 1792 treaty. A cho-yon relationship between the Buddhist rulers of Tibet and the Hindu monarchs of Nepal was impossible, and following heavy losses, Tibet signed a treaty that restored Nepal’s extraterritorial rights and reinstated Tibet as a tributary of Nepal. To further strengthen the tribute agreement, for the first time Nepal promised to be the ‘protector’ of Tibet, pledging military assistance in the event of a

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<sup>25</sup> A peace agreement was concluded in 1842, and later reaffirmed by the Tibet-Ladakh treaty of 1852.

foreign threat. Meanwhile, the Lhasa Amban was seldom involved in the negotiations, and if he was, his advice was frequently ignored (Rose 1971:115).

Qing officials objected to the terms of the treaty, arguing that ‘as both governments were tributary to China it was improper for Tibet to become also a tributary of Nepal’ (Rose 1971:117). Interestingly, however, Qing concerns were clarified when, after Nepal refused to modify the terms, the Ambans asked the Nepali representative if Nepal had been fighting against China or only Tibet, and whether the King of Nepal still respected the emperor. In reply, the envoy stated that Nepal ‘had suffered no provocation from China and had only warred against Tibet’. At this point, Nepal agreed to add a statement to the treaty declaring that Nepal would continue to respect the emperor, and the Amban’s seal was duly fixed to the treaty.

Tibet’s association with Nepal clearly illustrate that the extent to which Qing China was willing or able to intervene in Tibetan affairs varied considerably over time. Even during the brief periods in which the Qing did exert significant influence, 1720 and 1792, the Ambans had limited capacity to exert authority beyond Lhasa. There were other reasons, rather than any significant Manchu control, as to why the Ambans’ presence was tolerated. First, some factions in Tibetan monastic and political institutions favoured a nominal Chinese presence in Tibet, seeing it as a way to weaken political rivals in the Lhasa administration (Rose 1971:112).<sup>26</sup> Additionally, in Tibet the continual sponsorship of Tibetan Buddhism by the Qing court instilled confidence, reinforcing the notion that Tibet was a respected power rather than a mere ‘vassal’. The seriousness with which Manchu emperors took their roles as Buddhist patrons has since been obscured by official Confucianist historiography, but becomes clear if the role of Tibetan lamas at the Qing court is examined.

## **2:7 Tibetan Buddhism at the Qing Court**

One of the most important Tibetan reincarnate lamas connected with the Qing court was the Chankya Khutukhtu. The Manchu relationship with this respected

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<sup>26</sup> For further background see Goldstein. 1973:447 and Macdonald. 1929:52-53.

incarnation began in 1706, when the Kangxi Emperor declared him to be the great national preceptor of China. This title was renewed by Yongzheng emperor in 1734 (Wang 1995:109). It was during the reign of Qianlong (r. 1736-1795), however, that the Chankya Khutukhtu came to occupy a very special position at the court. Whilst, as noted above, the habitual bestowal of titles had little significance in the context of the tribute system, the Qianlong Emperor severely limited the number of lamas with imperial ranks. More importantly, Chankya Khutukhtu became the emperor's personal advisor, residing at the court and supervising the court's Buddhist affairs.

In the reign of Qianlong, the incarnate Chankya Khutukhtu was Rolpai Dorje (1717-1786). By all accounts, Rolpai Dorje was a prestigious scholar, his erudition earning respect throughout Tibet, China and Mongolia. He became the fourth-highest ranking incarnation in the Tibetan Buddhist world (Wang 1995:256). His high position at the court of Qianlong is evident in the fact that he was granted a yellow cushion and a yellow umbrella, both with golden dragon patterns matching the emperors. In addition the emperor allowed Rolpai Dorje to lay a golden top over his yellow palanquin, an honour even imperial family members were denied (Wang 1995:296). Despite living at the Manchu court, Chankya Khutukhtu shared Tibetan beliefs about the superiority of the spiritual preceptor over the patron, even if that patron was the Qing Emperor. He maintained contact with the Dalai Lamas and Panchen Lama, and worked on their behalf for more favourable Qing policies regarding Tibet. Importantly, Chankya Khutukhtu provided clear reasons for the Tibetan government to view Tibet-Qing relations as a cho-yon alliance, rather than in terms of the Confucian tribute system. After all, Chankya Khutukhtu declared, 'I live in the Chinese area and have converted the emperor into a pious Buddhist' (Wang 1995:166). Certainly, throughout Qianlong's reign, Tibetan Lamas were highly acclaimed. This is illustrated by the fact that when the Panchen Lama was officially invited to a court event the Emperor issued an edict excusing the Panchen Lama from the ritual of kowtowing. The edict also noted that Rolpai Dorje was routinely exempt from this court ritual (Wang 1995:246).

It is highly significant that court protocol deviated from Confucian norms. As noted above, Qing law severely punished officials who transgressed the strict rules of ritual propriety, as seen in the case of the official who failed to alight from his palanquin before crossing the temple threshold (Bodde, Derk and Morris 1973:277).

The performance of the kotow, 'three kneelings and nine knockings of the head,' was a Confucian ritual that expressed the nature of the relationship between inferior and superior (Pritchard 1943:165). The emperor too, as mediator between heaven and earth, would perform the kotow before the altar and his ancestral tablets. As such, the ritual had a theocratic significance that would have been distasteful to Tibetan lamas, whose vows as ordained monks prohibited them from prostrating before a layperson. Despite receiving religious titles from Tibetan lamas, and being identified with an important bodhisattva, the Qing Emperor was a lay student. According to the Tibetan Buddhist hierarchy, both Panchen Lama and Chankya Khutukhtu were spiritually superior to the emperor. Indeed, when Qianlong received initiations from Chankya Khutukhtu, the emperor was required to pay honours to his master, and 'knelt down on the bare floor, and bowed his head to the lama's feet' (Wang 1995:294).

The treatment of important Tibetan lamas was all the more remarkable, given that the kotow ceremony was usually demanded of foreign envoys up until about 1873. As late as 1859 the American Minister John E. Ward was denied an audience after refusing to perform even one kneeling and three head knockings (Pritchard 1943:165). There were precedents for departure from prescribed protocol, and Tibet was not an exclusive case. The 1690 edition of the Qing collected administrative statutes states that 'in 1664 it was settled that whenever foreign countries admire (Chinese) civilisation (*mu hua*) and come with a tribute of local produce, it should be examined and accepted as they present it, without adhering too closely to the old regulation' (Pritchard 1943:181). Indeed, the 1689 Russo-Mancho Treaty of Nerchinsk was an agreement between equals. Furthermore, in 1731, Qing envoys performed the kotow in Moscow, and did so again in St Petersburg in 1732. These deviations have been interpreted 'only as partial deviations, because the early Ch'ing [Qing] emperors had not yet been assimilated by Chinese culture (Fletcher 1967:224). Yet, significantly such deviations persisted even when the dynasty was at the height of its power. These departures from Confucian orthodoxy occurred not only in Tibet, but in Qing dealings with the Begs of Kokand, and the Qing encounter with the British emissary Lord McCartney in 1793 (Fletcher 1967:219-224, Hevia 1989, Pritchard 1943). In all cases, deviation occurred when the Manchu Emperor was required to recognise the authority with which the foreign party wielded cultural and political difference. However, in the case of Muslim Central Asia and early British relations, Beijing still insisted that

contact took place within a Confucian framework, albeit a modified one. The case of Tibet is unique in that Manchu emperors were willing to base relations on entirely non-Confucian principles.

There can be no doubt that some Qing emperors revered leading Tibetan Lamas. Even as they destroyed rebel monasteries along the frontier, they still became the disciples of Tibetan lamas and preached Tibetan Buddhism in the court. The political advantages of patronising Tibetan Buddhism were undoubtedly great, and it is clear that Qing emperors were willing to exploit titles given by Tibetan lamas to these ends. Yet, even so, the lengths to which some Qing emperors went suggests that the commitment to Tibetan lamas was as significantly personal as it was politically expedient. Jianxi, Yongzheng and Qianlong emperors all took a personal interest in Tibetan Buddhism, with Yongzheng and Qianlong in particular committing themselves to the study of Buddhist texts and encouraging young princes, imperial clan members, court officials, and concubines to do the same (Wang 1995:126). It can be no coincidence that the emperor who forged the closest tie with the Tibetan government was also the emperor who displayed the greatest personal commitment to Tibetan Buddhism. The Qianlong Emperor used Tibetan Buddhism to pacify the Mongols, but he also sought divine blessings and believed in the power of magic (Wang 1995:134). He invaded and seized control of territory on the Tibetan frontier occupied by independent tribes who paid allegiance to Lhasa, yet ordered that the Fugian Governor-general carry a sacred Tibetan relic for protection when on a military mission to Taiwan (Wang 1995:133-134, 317). Once, in 1750, Tibetans murdered the Qing Amban in Lhasa, and Qianlong threatened to seize temporal power from the Dalai Lama and incorporate Tibet into China. Yet, ultimately, Qianlong listened to his religious teacher Chankya Khutukhtu, who argued that, as a Buddhist, the emperor had a duty to protect the Dalai Lamas' temporal and spiritual rule (Wang 1995:217-218). Finally, despite turning away European envoys who refused to perform the kotow, the Qianlong Emperor himself prostrated before the feet of Chankya Khutukhtu in order to receive religious initiations.

Throughout, Qing official documents distinguish Tibet and China as separate political entities. Even when Tibet was officially considered China's inferior, there were clear references to borders between the two countries. Thus, when Qianlong's

official Tibetan Buddhist preceptor suggested that the emperor give certain frontier territories to the Dalai Lama, the emperor refused, declaring that such places ‘should remain within China’ (Wang 1995:215, 217). Similarly, when writing to the British regarding the Nepal-Tibet dispute, the emperor referred to both Nepal and Tibet as separate countries. The Manchu court did intervene in Tibetan affairs, but only on a limited basis. Qing intervention was not unique to Tibet; for example, Qing troops also intervened in internal revolts in Korea (Rockhill 1887:16). What was unique to Qing-Tibetan relations was the spiritual authority exercised by Tibetan Buddhist hierarchs. Because this meant that Tibet had political influence in Mongolia, Qing policy in Tibet was therefore one of careful balance. It was on this basis that the Qing dynasty maintained legitimacy in Mongol regions. (Wang 1995:63).

To maintain this balance, it was essential that Qing policy remained flexible. It was against Qing interests to try to incorporate Tibet into China. After all, the dynasty had barely succeeded in establishing administrative control over the Chinese provinces adjacent to the Tibetan frontier (See generally Adshead 1984, and Herman 1997). This made it even more essential that frontier conflicts were rigorously suppressed. These frontier areas were inhabited by Tibetans and Mongols who were subject to shifting alliances, and were largely independent of either Lhasa or Mongolia. To a certain extent, this allowed the Qing relative freedom the area, if conflicts arose. At times, however, securing the frontier also meant ‘challenging the Dalai Lama’s suzerainty’, and when this occurred the Manchu court had to tread carefully, compensating the Dalai Lama through a system of annual payments (Perdue 2001:292-293). The success of Qing frontier policy relied upon maintaining good relations with the central Tibetan administration, for the spiritual authority of the Dalai Lama was key to maintaining regional stability. This created tension between the ethos of the Chinese Confucian state and Qing sponsorship of Tibetan Buddhism, a situation that was further complicated by the personal Buddhist beliefs of individual emperors. The Manchus could not afford to alienate Confucian elites, and risk undermining the legitimacy of their rule. However, through careful management, Qing emperors ensured that deviation from Confucian ritual could, and did, take place. It was not until Western imperialism challenged the viability of the Manchus’ rule, that this deviation was to become an impossibility for the Confucian state.

## Chapter Three

### 3:1 Introduction

The period spanning the end of the nineteenth into the early twentieth century has been described as ‘the most intense period of boundary construction in the Earth’s history.’<sup>27</sup> According to Embree, ‘everywhere the last undemarcated frontiers were being replaced by linear boundaries marked with precision both on the ground and on maps’ (Embree 1977:275). This period of transition from indefinite frontiers to clearly defined borders marked the culmination of a century of imperialism in which jurists had become increasingly preoccupied with the question of sovereignty in international law. As David Kennedy observes, ‘by the end of the nineteenth century, sovereignty was a key term, an abstract and artificial conception of authority, suitable for doctrinal definition. In the early years there were many different sovereigns and many types of sovereignty, which overlapped unproblematically’ (Kennedy 1996:406).

The process of demarcating boundaries was, therefore, part of the project to define the territorial limits of sovereignty, but more than that, it was a process that recognised a very specific type of sovereignty, one that was dependent upon the existence of ‘civilised’ society. Hence, for positivists such as Westlake, Wheaton and Oppenheim, uncivilised societies lacked the capacity to exercise sovereignty. In this sense, the process of demarcating linear boundaries not only laid the foundation for the modern state, but also transcribed the boundaries of a moral community defined by international law and bound together by a universalistic discourse and identity (Keal 1995:204).

For Tibet, this process had several implications. First, with the rise of the unequal treaty system in China, and the attendant increasing circulation of international law amongst the Chinese literati, the foundations of the traditional Qing-Tibetan alliance became unsustainable. As the Imperial Court moved towards a policy of defending China’s sovereignty, the complex system of overlapping religio-political

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<sup>27</sup> Prescott, J. R.V cited in Embree 1977:274.

jurisdictions that characterised the administration of the Qing-Tibetan borderlands became overlaid with an increasingly absolute assertion of Qing authority in the face of British and Russian imperial expansion. By the early twentieth century, Beijing had tightened its administrative control over large areas of territory along the Qing-Tibetan frontier.

As part of this ongoing process of frontier reinforcement, a new province, Xinjiang, was created in 1894 that significantly extended the existing Sino-Tibetan frontier. Inhabited primarily by Inner Asian Muslim tribes first conquered by the Qing in the eighteenth century, Xinjiang was politically disconnected from Tibet. Geographically, however, Xinjiang stretched from Western China, up and across the northern frontiers of Tibet to the edge of Afghanistan, thus dividing Tibet from Mongolia and acting as a buffer between Tibet and Russia. Whilst Qing influence in Tibet during this same period was almost non-existent, the incorporation of Xinjiang fundamentally altered Qing perceptions of China's frontier. By the early twentieth century, Beijing had shifted its position from a mid-nineteenth century official recognition of its lack of authority in Tibet, to an explicit assertion of its sovereign rights over Tibetan territory.

Second, whilst both China and British India were engaged in projects of frontier construction and demarcation, defining the limits of sovereignty so as to better preserve its centre, Tibet was increasingly represented, particularly within Western discourse, as beyond the frontiers of civilised society. Whilst this can be seen as part of the wider Western imperial phenomenon of Orientalism, Tibet, the land of mystery, was distinguished from both British India, the jewel of the Empire, and from China, home to 'that most commercial of races' (Morse Stephens 1899:246). Both India and China had proven to be founded upon ancient civilisations, even if in the eyes of Europe they were civilisations that had failed to evolve. Tibet, meanwhile, inhabited a more ambiguous space. On the one hand, nineteenth century Europe saw the birth of the discipline of Indology, and in relation to that the development of Buddhist studies. This, combined with increasing geographical knowledge, meant that certain aspects of Tibetan culture were more accessible to European scholars than ever before. On the other hand, as nineteenth century European philosophy perceived non-Western thought



to be based on non-rational myth, the foundations of Tibetan culture could not be considered synchronous to a coherent political society.

The political influence of Tibet's ruling Gelugpa sect was diffused through a religious network that stretched beyond the territory directly administered by Lhasa. In this sense, Tibet had indefinite frontiers. McMahon, who in 1914 gave his name to a much contested boundary line between China, India and Tibet, was guided by the following distinction:-

A frontier often has a wider and more general meaning than a boundary, and a frontier sometimes refers to a wide tract of border country, or to hinterlands or buffer states, undefined by any external boundary line. Such, until recent times, were the North-West Frontier and the North-East Frontier of India; the one comprising the wide indefinite area of independent tribes on the Indian Afghan border, the other a wide tract of a similarly indefinite nature on the Indian borders of Tibet and China.<sup>28</sup>

Yet, if Tibet's religious network was suggestive of indeterminate frontiers, this is not to say that Tibet's political administration had no concept of fixed linear borders. Tibet had demarcated its border with Ladakh by treaty as early as 1684, and reconfirmed it by treaty in 1852. The border between Tibet and China, meanwhile, was clearly demarcated in 1727 (Teichman 2000:2).

It is true that territory either side of the Sino-Tibetan boundary consisted largely of autonomous principalities, but those to the west of the line were essentially under the protection of Lhasa, whereas those to the east were governed by Beijing. The demarcation between Tibet and China, therefore, was similar to that employed by the British in India. In 1891, for example, Lyall made a distinction between 'boundaries of jurisdiction and boundaries of influence,' arguing that in the case of India, 'the outermost political boundary' was projected 'beyond the administrative border.'<sup>29</sup> This concept was subsequently championed by Curzon, who sought to implement a policy based upon the 'threefold Frontier.' The first frontier was an internal administrative border 'up to which the Government of India exercised its full authority, enforcing its

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<sup>28</sup> McMahon, H. A. 1935. 'International Boundaries,' *Journal of the Royal Society of Arts* 84, 4. Cited in Embree 1977:257.

<sup>29</sup> Lyall, Alfred. 1891. 'Frontiers into Protectorates.' *The Nineteenth Century*, 30, 315. Cited in Embree 1977:276.

own legal and political systems as the standard for society' (Curzon 1907). This was followed by a zone that was left primarily in the hands of tribal chieftains, under loose government supervision. It was the outer limits of this zone that marked the second frontier, and also constituted a fixed boundary. Beyond that boundary line, the British sought to maintain a series of protectorates, or buffer states. The British system was thus analogous to the system already in place in Tibet and China. For China, Tibet was essentially a buffer state that protected its 'second frontier.' Until the early twentieth century, that second frontier was demarcated by the boundary line of 1727, which on the eastern side was followed by a swathe of territory incorporated only loosely into the Chinese provincial system as Native States. Beyond that lay the first frontier, from which standard provincial administration began.

What this comparison shows is that recognition of a wider zone of influence did not necessarily preclude the existence of a more narrowly demarcated entity within it. By the end of the nineteenth century, the traditional Qing-Tibetan cho-yon alliance had proved to be an untenable method of maintaining frontier security, not only for the Imperial Court, but also for the Lhasa administration who could no longer rely upon an assertion of spiritual power as the basis for its political influence. In its place, a Western system of treaties emerged that, while negating the basis of the traditional system, did little to clarify the status of Tibet in the international legal context. This ambivalence was underscored by the emergence of a Western discourse that represented Tibet as 'other-worldly.' This chapter sets out to explore the changing nature of the frontier in nineteenth century China and Tibet, and place it in the context of European, in particular British, imperial discourse surrounding the nature of civilised and uncivilised society.

### **3:2 The Frontier in Qing China**

The preceding chapter outlined the historical relationship between Tibet and China up to the end of the Qianlong reign. This underscored the fact that the geographical space occupied by the Tibetan people was also a space within which a historically distinct worldview operated. Whilst Fairbank put forward a highly influential argument that the Qing emperors' worldview recognised 'no boundedness', only 'varying degrees of accommodation to Chinese custom as one moved outward

from the Sinic center,' the encounter between Tibet and the Qing court complicates this picture (Millward 1998:7). Fairbank's approach reflected the concern of early Western Sinologists to explain imperial China's failure to successfully meet the challenge of modernisation that arose as a result of its encounter with Western powers. Answers to this question constructed an image of a static, unchanging China whose inflexible Sinocentric institutions were incapable of innovation. It is true that Manchu emperors projected an idealised imperial cosmology that to some extent accords with this view, but, as argued in Chapter Two, this projection of Confucian essentialism did not necessarily represent the absolute reality of Qing rule.

More recently, research has emphasised the responsiveness and adaptability of the Qing emperors. For example, Waley-Cohen (1993a:1527) has shown how Qing emperors' condemnation of Western technology was double-edged and 'intended for a multiple audience,' allowing them to mediate between frequently contradictory goals. Berger (2003:6), in an analysis of the relationship between Buddhist art and political authority in Qing China, argues that Qianlong's daily Buddhist practice was evidence of his fluid sense of self. Hevia, meanwhile, looking at Qing tributary ideology, suggests that:-

'The imperial hierarchy is a continuously negotiated set of fluid relationships; relationships in which the superior and inferior are mutually dependent and contingent upon conditions that each produce for the existence of the other. This is not oriental despotism...It is, rather, a means of fashioning, sometimes tenuously or unsuccessfully, a cosmo-moral world in response to ever changing conditions (Hevia 1989:100).

These analyses present a picture of the Qing Empire as a decentred rather than centralised entity. Fairbank's model of a Sinocentric empire erased the distinction between the Empire and China proper, and in so doing failed to account for the agency of the peoples and nations that occupied the territories that 'lay beyond the pass.'<sup>30</sup> However, the image of the Qing Court as the unequivocal Sinic centre from which the civilising influence of Confucian culture radiated has given way to an impression of the Qing Empire as 'a confederation of discreet, culturally distinct blocks' (Berger

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<sup>30</sup> The administrative limits of China were the eighteen provinces the Qing inherited from the Ming. Millward 1996:115.

2003:9). This permits the reframing of the role and scope of the frontier in the Qing Empire.

Frontier studies have a specific place in Chinese intellectual history, and constituted a distinct discipline by the end of the nineteenth century. As a field of research frontier studies in Qing China did not evolve until after Qianlong. Indeed, during the reign of Qianlong, frontier studies, along with other writing on security and strategic matters, were banned. The defeat of the Dzungars by the Qing in the mid-eighteenth century brought a large area of Inner Asian territory into the Qing Empire for the first time. Although this territory became part of the greater Qing Empire, it was not incorporated into the provincial administration system. The eighteen provinces that made up the 'inner land' (*neidi*) of the Qing were clearly demarcated from territories 'beyond the pass' (*guanwai*). Nevertheless, this extension of the Qing sphere was in part facilitated by an exercise in imperial cartography that brought the Tarim Basin and its neighbouring Muslim oases 'onto the register and onto the map' (Millward 1999:61). This, in turn, led to a radical development in how the frontier was perceived in Qing China, which when combined with later developments along the Chinese maritime frontier and an unstable internal situation, had a significant impact upon the perception of traditional Sino-Tibetan relations.

The frontier in traditional Chinese painting and poetry was frequently portrayed as a barren landscape that symbolised emotional alienation and spiritual isolation, but which also offered the potential for transformation. This separation of inhabited place from imaginative space was reflected in traditional Chinese cartography, which throughout the seventeenth century depicted Inner and Central Asia as *terra incognita* beyond the Chinese sphere. In the early eighteenth century, this perception was modified slightly following Jesuit trigonometric surveys commissioned by the Kanxi Emperor.<sup>31</sup> These maps were not considered suitable for public dissemination, however, and were kept secure at the Imperial Court. This knowledge continued to be suppressed throughout the Qianlong era due to a prohibition on public debate of frontier issues. More traditional imagery of cultural 'otherness' beyond the frontier continued to be perpetuated in the writing of the officials sent to the 'New

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31 The Kanxi atlas maintained a distinction between China proper and Inner and Central Asia by employing Manchu as opposed to Chinese toponyms for Manchuria, Eastern Turkestan, Mongolia and Tibet (Millward 1999:75).

Dominions.’ L.J. Newby, for example, explores how, over time, this literature ‘contributed to how the region was created and shaped in the minds of Chinese literati and how the intellectual and cultural borders of China were expanded to incorporate the ‘new frontier’ (Newby 1999:2). Officially commissioned administrative handbooks also served to increase knowledge of, and interest in, the North-West frontier, even though these publications had a limited audience. These official publications included a revision of the famous eighteenth century Jianxi atlas (Millward 1999:73). Yet, despite these developments, because of court restrictions upon publication, the cartographic tradition of presenting Inner and Central Asian regions as abstract, otherworldly spaces continued well into the nineteenth century (Millward 1999:72).

The newly acquired Western Region, Xinjiang, did not appear upon a commonly available map until 1822 (Millward 1999:76). It was also about this time that frontier issues became a popular issue amongst the literati. In the capital, the romantic accounts of travels in frontier regions fuelled an interest in the exotic that made the frontier the fashionable topic of the day (Chou 1976:86). Additionally, increasing population pressures coupled with visible dynastic decline in the post-Qianlong era prompted a group of scholars, collectively known as the Statecraft school, to press for reform of frontier administration. They argued that China could revitalise its weak military and utilise untapped natural resources through the resettlement of impoverished people from Southeast China in the frontier territories (Chou 1976:100, 117). As part of this project, it was proposed that Xinjiang be incorporated into the provincial administrative system.

The continued popularity of frontier studies was made possible by the Daoguang Emperor’s (1821-1850) decision to actively promote rather than prohibit such research in an effort to strengthen the court’s knowledge and bolster its power (Millward 1996:117). This change in policy was a result of the Qing Court being weakened following years of internal uprisings, in particular the rebellions of the White Lotus and Eight Diagrams sects (Yang in Schurmann and Schell (eds.) 1968:159). In addition to this, the Daoguang Emperor faced a growing crisis over opium. The resulting Opium War of 1840 led to a series of Western incursions that further increased anxiety about frontier defence. In particular, the calls for reforms on the North-West frontier became more persuasive following Russian expansion in Inner

Asia in the 1860s and 1870s. In addition Muslim tribes in the Western Region had united under Yakub Beg and were engaged in a widespread rebellion against the Qing. Due to the geographically strategic location of the territory involved, these developments potentially threatened China's control of the entire Mongol-inhabited frontier.

It is within this context that traditional cartographic depictions of Inner Asia changed abruptly. In 1871, a popular book-format atlas, by Yu Shouyi, was published depicting Xinjiang, Mongolia and Tibet alongside China proper (Millward 1999:75). Unlike its imperial predecessors, the outermost limits of the map were demarcated with a clear line, whilst at the same time there was no distinction between the 'inner lands' and the territories 'beyond the pass.' This represented a new way of viewing the frontier, one which radically altered conceptions of a Qing Empire, and posited a 'greater China' in its place. Significantly, this move was in line with European conceptions of political sovereignty, and thus began the process by which the Qing Empire was transformed into the Chinese state. By the end of the nineteenth century the frontier had taken on a new significance, and moreover was a topical issue discussed amongst a wider demographic section of the population than ever before.

Ironically, during this timeframe, Tibet was growing increasingly remote from the Qing Court. The breach in Sino-Tibetan relations has been commonly associated with the modernising efforts of the Thirteenth Dalai Lama, who ascended to power in 1895. It is true that the Thirteenth Dalai Lama was the strongest Dalai Lama to emerge in Tibet for over a century.<sup>32</sup> However, the decline in Qing power in Tibet occurred much earlier than 1895. Qing officials attributed the decline of imperial power in Tibet to the relinquishment of key military and financial powers to the Government of Lhasa in 1847, and to the cession of Nyarong to Lhasa in 1865 (Ashead 1984:57, Teichman 2000:3-5).

Nyarong was one of several states in Eastern Tibet that bordered China. Occupied primarily by nomadic Tibetan tribes, these areas were largely autonomous, but had been partitioned by the Yung-cheng Emperor in 1727 into Chinese and Tibetan

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<sup>32</sup> Between the demise of the Seventh Dalai Lama and the ascendancy of the Thirteenth, Tibet was governed primarily by a succession of Regents. Macdonald 1929:52-53.

protectorates. This fairly straightforward arrangement had become increasingly complex due to the extension of Gelugpa monastic power in the region, meaning that lamaseries on the Chinese side of the frontier paid taxes to Lhasa and received local taxes, whereas the Qing Court maintained only the protectorate's right of transportation, animals and labour (*wu-lu*) (Ashead 1984:56-57). The declining power of imperial authorities on the Chinese side of the frontier encouraged Tibetan tribes in the region to unite in a mission to establish a separate Khamba state. In response, the Central Tibetan authorities suggested a joint Tibetan-Qing mission to restore peace along the frontier, but the Taiping rebellion meant that the Qing Imperial army could not afford to divert resources to the Tibetan borderlands. Taking unilateral measures, Lhasa then demanded an indemnity from the Governor-general of Sichuan to cover military expenses. Unable to pay, Nyarong was ceded to Lhasa by the imperial government. In addition, Lhasa also appointed high commissioners to the neighbouring states of Hor and Derge, meaning that the Qing Court lost control over a significant portion of its Tibetan frontier protectorates.

At a later date, imperial officials were to place high importance upon the loss of the Qing protectorates in the Tibetan borderlands. However, it does not necessarily follow that the result was either a weaker frontier or a loss of Qing influence in Central Tibet. Arguably, the intervention of Central Tibetan forces merely restored peace to the frontier, and moreover allowed for commercial and diplomatic traffic between Lhasa and Beijing to resume, something of key concern to both governments during the crisis (Ashead 1984:57). Certainly, the Imperial Court's acceptance of the cession of Nyarong, Hor and Derge was formally reconfirmed in 1898, suggesting that it was seen as a long term practical solution (Willoughby 1924:193). The significance attached to the loss of these Native States by late Qing commentators is perhaps better understood as an indication of a fundamental shift in perceptions of the frontier that occurred in the 1870's. Chou has observed that whereas early nineteenth century Qing writers portrayed the frontier peoples 'with interest and amusement,' in the later century 'references made to the minorities were often phrased in contemptuous ways. This change reflects the difference between a genuine self-confidence and a nervous chauvinism' (Chou, cited in Millward 1988:196-197). It is therefore of interest that this same period saw a growing cultural gap develop between Lhasa and Beijing. As the literati within China became increasingly fixated upon how to preserve or reform

Confucian Han Chinese culture in the face of Western onslaughts, and the Manchu administration increasingly fought to retain its legitimacy in the face of anti-Manchu agitation, there was little scope for displaying a flexible ideological policy towards potentially troublesome frontier territories.

In this context, it is of little surprise that post-Qianlong emperors withdrew their religious patronage of Tibetan lamas. Whereas Manchu emperors up to and including Qianlong had commissioned the building of Tibetan Buddhist monasteries and temples, the sponsorship of Tibetan Buddhism tailed off when Jiaqing came to the throne (1796-1820) (Farquhar 1978:26). It seems likely that rebellions of the White Lotus, a millenarian Buddhist sect, during the first eight years of Jiaqing's rule were a significant factor in the decline in the court's overt interest in Buddhism. Confucian elites had long been critical of Buddhism, and the White Lotus rebellions reinforced these prejudices by underlining the danger of religious heterodoxy. Qianlong had been openly criticised for his interest in Tibetan Buddhism, but had sufficient power to avoid being politically damaged by such censure. However, as the Manchu throne became progressively weakened during the course of the nineteenth century, any association of the throne with heterodoxy became increasingly hazardous.

### **3:3 The Unequal Treaty System**

After end of the Opium War, China suffered a series of incursions along its frontiers, starting with the cession of Hong Kong and the opening of five treaty ports to British trade in the 1842 Treaty of Nanjing.

This was followed by the Treaty of Tientsin in 1858, the result of French and English forces occupying Canton, and the 1860 Treaty of Peking [Beijing], which was the outcome of a joint French and English military mission to the capital. The indignity of being forced to enter into the 'unequal treaties' was amplified by the Taiping Rebellion, which raged for fourteen years between 1851 and 1864 and espoused a revolutionary Christian ideology grounded in anti-Manchu sentiments. The rebellion was eventually defeated in 1864 with the aid of Western mercenaries, who feared that a Taiping victory would lead to a loss of concessions granted under the treaty system (Franke in Schurmann and Schell (eds.) 1968:175). Together these treaties formed the



basis of the unequal treaty system, and mark the point at which China's tributary system began to be replaced by a modern system of international law. Nevertheless, the tributary system was not abandoned and, although elements of international law began to be incorporated into Qing diplomatic practice, this adaptability was not in itself a new phenomenon. As Cranmer-Byng points out 'throughout the Chinese documents of the period from the 1840s into the 1880s these treaties were regarded not only as concessions extracted by force, but also as traditional methods of controlling those who did not accept the Chinese world view' (Cranmer-Byng 1973:69). In fact the Qing court had used Western-style treaties as early as 1689, when it concluded the Treaty of Nerchinsk following the Sino-Russian military conflict in the Priamurye region.

What is unique is that this adaptability was accompanied by an unprecedented level of public debate, spurred on by the development of journalism. Furthermore, the opening of the treaty ports and an increase in missionary activity increased civilian contact with Western ideas. Missionaries in particular were instrumental in disseminating Western secular educational materials, including works on Western law, history and geography (Barnett 1972). As the Chinese literati became increasingly concerned with China's vulnerable position in the face of Western imperialism, scholars and officials began to turn towards such works for strategic knowledge of the Western powers. Barnett has argued that such materials, although useful to Qing officials, only served to strengthen prejudices against the Western barbarians, and that: 'Notices of the territorial expansion of European nations, their struggle for supremacy on the seas, their allegiance to the Christian God, and the power of the Pope provided arguments against, rather than for, the 'open' China the missionaries had in mind (Barnett 1972:148). However, even if early nineteenth century Chinese interest in Western knowledge was defensive rather than sympathetic, by the end of the nineteenth century the circulation of Western ideas was sufficient to constitute a significant challenge to Confucian orthodoxy.<sup>33</sup>

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<sup>33</sup> See also Dikotter, who argues military and economic impact was overemphasised (Dikotter 1994:33), and Chang who opines that the late nineteenth century reform movement owed as much to the inner dynamics of the tradition as Western impact (Chang 1969:25).

One of the outcomes of the Treaty of Peking was an increase in missionary activity in the interior of China. Missionaries had already succeeded in gaining a greater presence within China over the first few decades of the nineteenth century, but their activities met with both local and government opposition (Bray 1995:86, and generally, Bray 1989). In 1844 the emperor issued an edict prohibiting missionaries from travelling beyond the five treaty ports that had been opened to foreigners after the Opium War. The emergence of the Taipings as a revolutionary force in 1846 could only have strengthened imperial hostility towards the spreading of Christian heterodoxy, but the rise of missionary activity did not just pose a problem to the internal administration of China, it also caused a very specific disruption in the emperor's relationship with Tibet.

Western missionaries were not unknown in Tibet. Jesuits had travelled to Lhasa as early as 1661 and a Catholic mission was active in Lhasa throughout the first half of the eighteenth century (Lopez 1995:253-256). By the nineteenth century, however, the government of Lhasa had come to associate Western missionary activity with Western colonial activity. Missionaries attempting to cross into Tibet were therefore routinely turned back. In 1846, two French Lazarist missionaries, Huc and Gabet, succeeded in reaching Lhasa by travelling in disguise from China, but were frustrated to find that the local population believed them to be British agents and that they had 'come to make maps, and to devise means to get possession of the country' (Cammann 1942:350). Rumours of an impending British attempt to invade Tibet gained force following the British annexation of Ladakh, a territory considered to be a dependency of the government of Lhasa. Subsequently, Huc and Gabet were summoned by the Qing Amban of Lhasa and extradited to China where they were charged with illegally travelling beyond the treaty port from which they had originally begun their journey.

The Imperial Court's actions in this situation conformed to its role as the protector of Tibet, as established by the Cho-Yon alliance, but from the point of view of the French authorities, the limits to Qing jurisdiction in Tibet were far from clear. Consequently, the issue of missionary rights in Tibet continued to be a cause of contention between the French legation and Beijing. In 1860, the controversy took a new turn following the Treaty of Peking. The treaty, which had been obtained by the

Anglo-French allies under threat of force, stipulated that the Qing Government was to guarantee the freedom of religion throughout the Chinese Empire. The French legation, believing that the treaty guaranteed rights in Central Tibet, pressured the Zongli Yamen to issue missionaries with passports to enter Tibet. The Zongli Yamen relented, but had considerable reservations about the possible ramifications of issuing the passports.

The ambivalence of the Zongli Yamen, who desired to avoid further conflict with Western powers on the one hand, but could not afford to alienate Lhasa on the other, is evident in its refusal to deal further with the French mission after it was subsequently expelled from Tibet. In 1863, the Tibetan government issued an edict threatening punishment to any Christian converts who refused to return to Buddhism. The French Mission, then established in Bonga in Eastern Tibet, argued that they had the support of the Emperor of China, but this had little impact upon the local Tibetan representative, who Huc records as responding ‘Si l’Emperor de Chine est grand ou petit, gras ou maigre, je l’ignore, dit grossièrement le chef de satellites, mais je sais que nous avons des ordres du roi de Hlassa et que nous devons agir en conséquence’ (Bray 1995:94). The mission was finally expelled by force, resulting in the death of a missionary and several converts, but when the surviving mission lodged a complaint in Beijing, the Zongli Yamen stated that ‘the Emperor’s temporal authority in Tibet was conditional on his acceptance of the Dalai Lama’s spiritual authority. If the Chinese government declared itself the protector of Christianity it would be seen to be opposed to Buddhism and would therefore undermine the moral position of its position in Tibet’ (Bray 1995:91).

The French authorities, seeking to uphold their missionaries’ rights, refused to accept that the Qing Emperor was the spiritual vassal of the Dalai Lama, despite the statement of the Zongli Yamen. To the French, Qing authority in Tibet was either absolute, in which case the Treaty of Peking applied, or Qing authority in Tibet was negligible and neither the Tibetan Government nor the Lhasa Amban had any right to expel the missionaries from Tibetan territory. The refusal of the French Legation to accept that the Dalai Lama’s spiritual authority placed limits upon the political authority of the Qing Emperor was partly a strategic argument to secure missionary rights. It is also indicative, however, of a more pervasive Western perception that Tibet

did not possess a viable indigenous system of law and governance. This perception played a significant role in negating the agency of the Tibetan Government, and thus provided the foundations upon which later Chinese claims for sovereignty over Tibet were based.

### **3:4 British India and Tibet**

Over the course of the nineteenth century, the religious and spiritual aspects of Tibetan society became increasingly exoticised in Western discourse. As part of this process, the frontiers of Tibet's religious authority were redrawn. The spatial representation of Tibetan Buddhism in Western discourse depicted Tibetan culture as being governed by an 'other-worldly' aesthetic (Lopez 1998 and Tambiah 1973). This construction displaced the rational foundations of Tibetan Buddhist philosophy and deferred its social, legal and political contingency. The representation of Tibetan Buddhism as 'other-worldly' coincided with an attempt by the British Government of India to turn Tibet into a neutral buffer state, as part of a forward policy designed to protect British India against Russian imperial expansion. This project necessarily involved the suggestion that Tibet's status was ambivalent. Hence, by the turn of the twentieth century, Tibet had come to occupy a contradictory space, neither independent nor part of the Russian, British or Chinese empires that sought to control Tibet's status as part of their own frontier defence strategies. In Western discourse, Tibet was at once an other-worldly domain that transcended the temporal, mundane concerns of Western colonialists, and, in British Indian sources in particular, a potentially dangerous worldly frontier, across which a Tibetan-Russian alliance might threaten India. Despite the paradox of Tibet's other-worldly mystery and its menacing worldliness, in both constructions Tibet represented the limits of the British Empire, a space that hovered on the borderlines of civilisation, but remained somehow apart from it.

This perception had not always dominated. In the eighteenth century, the British East India Company, anxious to develop a trade relationship with Tibet, sent delegates to Tibet to forge ties and research opportunities. The first delegate, George Bogle, arrived in Shigatse in 1774 and remained there as the guest of the Panchen Lama for six months. Bogle wrote extensively upon his experience, and what remains

striking about his narrative is that it departs significantly from the majority of successive Western travelogues on Tibet in that Bogle neither idealised nor disparaged Tibetans. Bogle presented his host as ‘one of the most pleasant men I ever saw,’ and moreover, as an astute political and religious leader’ (McMillan 2002:24).

This contrasts with literature from late nineteenth and early twentieth century British writers. Waddell, for example, a British functionary in Sikkim, published what was considered to be the authoritative study of Tibetan Buddhism in 1895. Waddell presented Tibetan Buddhism as a degenerate version of Buddha’s original doctrine, comprised of ‘deep-rooted devil worship,’ and recorded that although ‘books now abound in Tibet’ they were ‘for the most part a dreary wilderness of words and antiquated rubbish’ (Waddell 1895:xi,157). Despite writing this book in 1894, Waddell did not travel extensively in Tibet until 1904 when he was a colonel in the British military mission which fought its way to Lhasa. This event was covered in his second book ‘Lhasa and its Mysteries’. Here, Tibet is portrayed as ‘one of the last secret places of the earth’, which had finally had ‘her dark veil of mystery...lifted up’ by ‘the fairy Prince of ‘Civilisation’’ (Waddell 1905:2). By 1934, Waddell’s hopes for a Tibet tamed by the civilising influence of Britain had been dispelled. In the second edition of his 1895 book, he opined that Tibet was in the grip of ‘all-powerful and superstitious, intriguing lamas’ who persistently prevented the civilising influence of the West from being disseminated. This situation, according to Waddell, had only been made worse by Tibet’s political independence at that time (Waddell 1895:xxxiii).

In the interim period between Bogle’s mission of 1774 and the British invasion of 1904, two more delegates were sent to Tibet; Turner, in 1785, and Manning, in 1811. The Tibetans, however, grew increasingly suspicious of British motives and became hostile to British efforts to establish diplomatic or trade links. As a result of Tibet’s refusal to enter into relations, the British increased their activities in the adjacent Himalayan foothills, seeking to gain control over the trade routes into Tibet from Nepal, Ladakh, Sikkim and Bhutan. In response, both Nepal and Tibet sought to deter Britain by claiming to be under the protection of the Qing Empire, a policy that in the early nineteenth century proved to be effective. Due to the relative weakness of the East India Company’s position in China at that time. As the British representative in Kathmandu noted in 1803, ‘The Ghorkalis are in the habit of saying

that...they will claim the protection of the Chinese, whose influence over the company they seem to be much better acquainted than one would expect' (Rose 1971:73).

The notion that Nepal was a Qing protectorate was largely dispelled when, in 1814, an ongoing border dispute between the company and Nepal led to a war between the two parties. Although Beijing ordered an expeditionary force to the Nepal-Tibet border, in the event the Imperial Government confined itself to threatening to invade Nepal should Kathmandu cease its tribute missions to Beijing as a result of British actions. Beijing desired no hostilities with the British and, providing traditional tribute relations were uninterrupted, the emperor approved an Anglo-Nepali settlement that gave the company the right to station a permanent representative in Kathmandu (Rose 1971:89-85). In fact, Qing officials became increasingly irritated by Nepali efforts to broker an anti-British alliance amongst the Himalayan states, Tibet and China. From the point of view of Beijing, Nepali agitation merely threatened the stability of the region. The Chinese representative at Lhasa, who was also responsible for Imperial affairs in Nepal, sought to uphold a traditional Qing policy that frontier states should 'be maintained in the most perfect tranquillity'. Beijing thus advised Kathmandu to 'rest on the defensive and live in harmony with your neighbours' (Rose 1971:100). With the frontiers of China proper being increasingly threatened, the Imperial Court could not afford to become embroiled in disputes in the outlying areas of its zone of influence.

Qing influence in Tibet was, like Nepal, almost non-existent at this time (Rose 1971:112-113). Unlike Nepal, however, Lhasa was more able to evade British overtures by deferring responsibility for its foreign affairs to Beijing. Although, by the mid-nineteenth century the British had increased their control over the Himalayan foothills, geographically Tibet remained fairly remote from British India. Moreover, it was not only the prospect of trade with Tibet that attracted the British, but also the possibility of using Tibet to open up trade routes with Western China, an area that remained largely inaccessible to Western commerce despite the opening of China's maritime frontier. This increased the willingness of the British to negotiate through China.

Therefore, Qing and Tibetan interests coincided at this time. From the point of view of the Tibetan government, refusing to deal with Calcutta directly was an effective defence strategy. Indeed, between 1811 and 1904 no British representative openly entered Tibet. For the Qing, Tibet's anti-British policy helped protect the Chinese provinces along the Tibetan frontier from Western influence. Despite this, the Imperial Court had only limited negotiating power. The treaty port system may have helped to contain Western influence in China, but the Opium War and the events leading up to the Treaty of Peking had made it clear just how vulnerable the court was to Western military power. Hence, in 1861, a year after the Zungli Yamen issued the controversial passports to the French mission, a British expedition also succeeded in securing passports to travel from China to India, via Tibet (Rose 1971:134). The British party claimed the right to the passports under the Treaty of Tientsin (1858) (Van Walt Van Praag 1987:27).

As with the French mission, the Qing documents were not recognised as valid by the Tibetan authorities. Lhasa refused entry to the British party. As a result, Britain renewed activities in Bhutan and Sikkim. In 1861, Calcutta concluded a treaty with Sikkim which, building upon a previous treaty from 1817, established Sikkim as a British protectorate (Van Walt Van Praag 1987:27). In 1865, the British secured a similar treaty with Bhutan following the Anglo-Bhutanese war of 1884. As Britain had already annexed Ladakh in 1846, and had controlled Assam since 1826, this ensured that Britain had established a strong influence over all the areas traditionally under the influence of Lhasa along Tibet's Southern and Western frontiers. Given that Ladakh, Sikkim and Bhutan paid tri-annual tribute to the Dalai Lama, these developments were taken seriously by Lhasa (Norbu 1990:32). The British were fully aware that this would have been the case, as since Bogle's mission they had understood Bhutan to be a vassal of Tibet, and indeed Tibet had mediated in the Anglo-Bhutan war of 1774.

At around this time, the British started sending secret agents into Tibet to gather information on Tibet's topography and administrative structure. Because Westerners were forbidden entry into Tibet, the British employed Indian pundits, of whom the best known is Sarat Chandra Das. Das, a talented linguist, made extensive notes upon Tibet's central and provincial system of government and produced a full account of the Tibetan legal system, describing Tibetan courts, legal codes and

punishments. Das' account demonstrates clearly that Tibet possessed a well established system of law and governance that was distinct from that of Qing China (Das 1894).

The failure of the British mission of 1861 confirmed that the Treaty of Tientsin, which gave British subjects the right to travel 'throughout the Emperor's dominions under passports issued by their consuls and countersigned by the local authorities,' did not apply to Tibet (FO 405/24). British Foreign Office records show that the British government accepted this to be the case, and indeed that none of the treaties between Britain and the Qing government concerning the Qing Empire as a whole were applicable to Tibet. Nevertheless, the British argued that the emperor's active involvement in Tibet's foreign affairs indicated that the Imperial Government possessed the authority to make treaties on Tibet's behalf. In 1876, the British, whilst negotiating a trade agreement with China, added an article to the Chefoo treaty which stipulated that the Zongli Yamen, and the Qing representative in Lhasa, would issue passports to a British expedition to Tibet and ensure the party's unobstructed passage.

This development was unprecedented in the history of Qing-Tibetan relations. Previously, Qing officials had helped broker treaties between Nepal and Tibet, but Tibet had been an active participant in the treaty-making process. Meanwhile, Tibet had concluded treaties independently without Qing involvement. What the Chefoo Convention implied, however, was that Tibetan acquiescence to Qing treaties made upon Tibet's behalf was mandatory rather than voluntary. For the British, this manoeuvre helped to weaken the foundations of Tibet's resistance to British expansion. For the Qing, the treaty upheld the illusion that Beijing maintained its imperial grip upon the peripheries of its zone of influence. More importantly, it also served as a bargaining chip in the context of the Chefoo Convention, which was concerned primarily with Sino-British trade, but also paved the way for the establishment of a Chinese diplomatic embassy in London.

In protest, the Tibetan government issued edicts to its border posts declaring all Qing issued passports invalid, and dispatched a military contingent to repel the British mission (FO 405/50). Beijing, alarmed that Tibet's continuing opposition would expose the insubstantial nature of Qing power over Lhasa, and fearful that



armed conflict would result in a British takeover of Tibet, took immediate steps to have the Macaulay expedition withdrawn (Shakabpa 1967:198, FO 405/50). To these ends, the Imperial Government offered to reach a settlement with Britain over Burma, a Qing tributary state that by 1884 had come fully under British control. Under the 1896 Convention Relating to Burma and Tibet, Beijing recognised British supremacy in Burma in exchange for the withdrawal of the Macaulay mission. In addition, the Imperial Court promised to exhort Tibet to open up to trade.

Whilst the 1886 treaty, unlike the Chefoo Convention, implied that Tibet's acceptance of the proposals was voluntary, it did not translate into a stronger role for Tibet in the ongoing dispute over British rights. The clash over the Macaulay expedition had led to a detachment of Tibetan troops being positioned in Lingtu. These troops were forcefully expelled by the British, who claimed Lingtu was in Sikkim. To back up their claim, in 1890 the British formally fixed the Tibetan-Sikkim border in the 'Convention Relating to Sikkim and Tibet,' signed in Calcutta by the Lhasa Amban (FO 405/50). The treaty went on to recognise Britain's 'direct and exclusive control over the internal administration and foreign relations' of Sikkim. A following treaty in 1893, also concluded between Britain and the Lhasa Amban, established British commercial rights in Tibet, securing Britain the right to station a representative at a designated trade mart on the Tibetan side of the border.

If by signing the treaties in Calcutta with the Lhasa Amban, rather than with Qing representatives in China proper, the British hoped that the Tibetan Government would be more open to persuasion, it was soon clear that this was not to be the case. Tibet repudiated the treaties and refused to recognise the newly demarcated Sikkim-Tibet border. Increasingly frustrated, the British were finally forced to concede the lack of Qing authority in Tibet. Indeed, even the Amban admitted the situation, stating that whatever promises the Zongli Yamen might make 'it is quite impossible in the present state of relations between China and Tibet for [it] to carry out [its] promise. People talk of China's influence in Tibet – but it is only nominal, as the lamas are all powerful there' (FO 17/1056).

By the end of the nineteenth century, the Qing Empire was considerably weakened. The inability of the Imperial Court to maintain a credible façade of

authority in Tibet was only one aspect of the crisis facing Beijing. The defeat of the imperial army in the war with Japan in 1885 was an even greater blow. In addition, the Qing had lost all of its South-East Asian tributary states to Western powers, and had suffered a humiliating defeat in the Sino-French war of 1884-5 as a result of trying to protect some of its interests in that region. Yet, for all these setbacks, the Manchus still held power over China proper, and managed to successfully tighten their rule over some of the outlying provinces at this time, in particular the province of Schechuan on the Tibetan frontier (Adshead 1984). In addition, in 1884 the Western Regions were finally incorporated into the provincial system as Xinjiang.

### **3:5 The Great Game**

In the 1870's, the Imperial Russian Geographical Society began exploring Tibet with a view to strengthening relations with the Dalai Lama and thus extending Russia's influence throughout the Tibetan Buddhist world (Andreyev 2003:16). The Anglo-Chinese treaties concerning Tibet convinced Russia to step up its activities in the region, especially as the Russian government was aware of Lhasa's objection to the developments. In between 1893 and 1896, the Russian government funded a project to annex the entire 'Monglo-Tibeto-Chinese-East' (Andreyev 2003:19, 26). Buryat agents disguised as Buddhist pilgrims were to agitate anti-Manchu and pro-Russian factions in the region. There was indeed a rebellion in Gansu in 1895, but the Qing army was able to defeat it.

Russian interest in Tibet was reciprocated by the Tibetan Government, who were seeking new alliances to replace the traditional Tibet-Qing relationship. A Russian Buryat Buddhist monk, Dorjiev, was employed in Lhasa at this time to act as an intermediary between St Petersburg and Lhasa. In 1897, the Dalai Lama sent Dorjiev on a mission to Europe to assess the political situation in St Petersburg and Paris, with a view to securing a Russian-Tibetan and/or French-Tibetan alliance. Negotiations in St Petersburg proved promising and, although no formal treaty was obtained, the Russian Government promised to send military assistance to Tibet to aid the modernisation of the Tibetan army (Andreyev 2003:27). On a political level, Dorjiev's visit to Paris was less successful, despite a meeting with a leading French politician. On a cultural level, however, Dorjiev achieved considerable success, for at

that time Buddhism was becoming increasingly fashionable in European capitals. Hence, in 1898 Dorjiev recited prayers at the Guimet Museum before an eager gathering of the Parisian elite (Andreyev 2003: 29-30).

Tibet continued to seek treaty relations with Russia, and further meetings in St Petersburg took place in 1900. In 1901, a Tibetan delegation dispatched by the Dalai Lama met with a Russian expedition on the borders of Tibet, reiterating the Tibetan position:-

‘Until now we had relied on the help of the Chinese Emperor, but after the Europeans, acting in concert, crushed the Chinese capital, destroyed many cities, and killed a great multitude of people, the Chinese find it very difficult to maintain order in their own homeland, to say nothing of giving help to the Tibetans. Our closest neighbours, the English, have repeatedly approached us with military forces; they are our enemies and may take advantage of our weakness. Although there are a few members of our administration who think differently, we, the majority, headed by the Dalai Lama, hold firm to our opinion, and we rely only on the lofty protection of your Great Emperor....Sooner or later we will have to open the doors of our capital, and we think somehow that we will open them peacefully only to you, the Russians’ (Andreyev 2003: 29-30).

The reorientation of Tibet from China to Russia represented an attempt to safeguard Tibet’s position in modern international society. Unlike China, Russia was classed as a Western power and a member of the civilised ‘family of nations.’ Yet, if a Russian alliance promised Tibet a stronger role in international society, Tibet’s pro-Russian stance was not an unprecedented move away from the traditional system of Tibetan foreign relations. Historically Lhasa had strong ties with Russian Buddhists, and given the fact that the Tsar had assumed the role as protector of Buddhism in Russia, a Russian-Tibetan alliance would have been consistent with a Buddhist choyon relationship. An obstacle to an agreement was Russian insistence upon the right to set up a permanent consulate in Lhasa. The Tibetan government argued that this would lead to other European powers seeking similar concessions and invariably lead to conflict (Andreyev 2003:35). However, following the 1901 negotiations, and a further promise from Russia to supply arms to Tibet, Lhasa sent an official embassy to Russia to conclude a formal treaty.

This embassy was the focus of significant public attention in Russia, touring Russian factories, naval bases and an aeronautic depot. Yet despite the hype, the resulting document only expressed the Tsar's 'Strong hope that, given the friendly and fully well-disposed attitude of Russia, no danger will threaten Tibet in her fortunes hereafter.' The document did not place Russia under any binding obligation to protect Tibet (Andreyev 2003:34). The draft of a Russo-Tibetan treaty was finally rejected by the Russian government during a special conference 'as it might have resulted in a conflict with England without offering any real advantages' (Andreyev 2003:36, 38). Finally, although Imperial Russia maintained discreet links with the Tibetan government until around 1914, with the end of the 'Great Game', Russia rapidly retreated from any plans of building overt links with Tibet, becoming more concerned with strengthening ties with Britain and China.

Even when pursuing a Russian-Tibetan alliance, Russia sought to downplay the political nature of its links with the Tibetan government, and assured the British that Dorjiev's 1901 embassy had 'purely religious' purposes (Andreyev 2003:38). Britain, meanwhile, similarly denied having any political motives in Tibet, claiming that British interests were confined solely to trade matters. Moreover, whilst the British Government of India did not trust Russian motives, at the same time it refused to give credence to Tibetan political agency. Prior to 1901, Curzon had dismissed reports of the Tibetan envoy's visits to St Petersburg as a 'fraud', unable to believe that 'the xenophobic Tibetan lamas would dare to send a mission to Europe' (Andreyev 2003:38).

The 'Great Game' in Tibet reached its conclusion following the Younghusband mission of 1903-1904. Whilst ostensibly to pursue trade, from the outset the mission planned for the use force (Younghusband 1998:75). The resulting invasion of Lhasa saw the massacre of the defending Tibetan troops, who faced British machine guns armed only with matchlock rifles. After 'the first futile rush the Tibetans made no further resistance. There was no more fighting, only the slaughter of helpless men,' wrote Candler (1905:147), who was present. The British victory was given legal validation in the form of the 1904 Lhasa Convention, which obligated Tibet to pay an annual indemnity for the next seventy-five years, 'for the insults offered to and attacks upon the British Commissioner and his following' (Art VI). Article VII provided for

the British occupation of the Chumbi Valley, and Article IX laid down provisions restricting Tibet's foreign relations. 'No Representatives or Agents of any foreign Power shall be admitted to Tibet,' it stipulated, without 'the previous consent of the British Government.' The 'insults' referred to in Article VI recall the fact that the Younghusband mission was as much about creating a moment of imperial spectacle, as it was about achieving any substantive economic and military goals.

It has been said that the British people have a distinctive grasp of the concept of irony. However, when Colonel Younghusband marched into Tibet in 1903, conveying the pomp and grandeur of the British Empire to the plains and mountain passes of Tibet, it appears that irony is one of the few things he left behind.<sup>34</sup> Reporting to the Secretary of the British Government of India, Younghusband described preliminary negotiations with the Tibetans near to the border. Having explained that the purpose of his mission was to establish trade relations, he then informed the Tibetan representatives that a trade route would ensure that 'you will be able to buy all your things much cheaper than you can now.' On hearing this the Tibetan representatives burst into laughter, presumably wondering why such a benevolent mission should require the backup of 1,150 troops with heavy artillery, over 11,000 pack animals and 10,000 'coolies.' Younghusband, clearly perplexed by the response of the Tibetan representatives, reported: 'curiously enough they also laughed equally heartily when I said that the new treaty would have to be much stricter than the old one' (Younghusband in Coates (ed.) 1999:105).<sup>35</sup> Failing to understand why the Tibetans should not only resist British overtures, but consider them a joke, Younghusband concluded that the Tibetans were 'very like big children' (Younghusband in Coates(ed.) 1999:105).

Younghusband persisted in this opinion, reflecting in 1910 that 'it may be said that we ought to have treated the Tibetans with leniency, gentleness, and consideration,

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34 Nevertheless, Younghusband found room for, among other personal effects: 67 shirts; 12 coats; numerous suits, including a full dress suit, a morning suit, a mess suit, camp suits and various marching suits; a smoking jacket; a variety of 11 hats, including a shikar hat to be worn when shooting partridges in the Chumbi valley (French P, 1995:200-201).

35 The old treaty referred to was the Convention Relating to Sikkim and Tibet (1890, amended in 1893). Tibet's repudiation of this treaty and occupation of territory claimed by Britain was one cause of the mission (Younghusband 1998:43, 58, 83). The summary of men and animals in the mission is cited by French, P (1995:194).

because of their ignorance' (Younghusband 1998:83). Back in England, he claimed to have undergone a spiritual epiphany, an event he linked to his return from Lhasa: 'Never again could I think evil or ever be at enmity with any man. All nature and all humanity were bathed in a rosy glowing radiancy...[T]hat single hour on leaving Lhasa was worth all the rest of a lifetime' (Younghusband 1998:305). It is, however, hard not to construe this to be a narrative sleight of hand designed to link the claim that 'it was aggression on the part of the Tibetans or their vassals which led to action on our part' (Younghusband 1998:83) to an imperial notion 'that all was for the best, in the best of all possible worlds' (Voltaire 1918), thus eliding the Mission's single-minded and violent pursuit of self-interest in Tibet.<sup>36</sup>

The 'opening' of Tibet had become something of a personal obsession for Colonel Younghusband and the Viceroy of India, Lord Curzon. Both were ardent advocates of a forward policy designed to dramatically expand the frontiers of British India, and both justified the policy by emphasising the threat posed by Imperial Russia to British Indian interests. In part, the Russian threat was exaggerated by Curzon and Younghusband so as to gain Westminster's approval for a forward policy at a time when British imperial expansion was becoming an increasingly sensitive issue for the home government. For Curzon and for Younghusband, the opening of Tibet was also a mission to penetrate one of the last remaining unexplored countries of the world, from which their exclusion had represented a personal insult: 'It is really the most grotesque and indefensible thing' wrote Curzon in 1902, 'that at a distance of little more than 200 miles from our frontier this community of unarmed monks should set us perpetually at a defiance' (Ghosh 1979:12). Despite this, their shared anxiety about the threat of a Russian-Tibetan alliance seems to have been genuinely felt (French, P. 1995:187, Younghusband in Coates (ed.) 1999:193,198).

The British advance prompted the Dalai Lama to depart to Urga from whence he planned to travel to St Petersburg and achieve a Russian-Tibetan treaty that would secure Russian protection. The Dalai Lama urged the Russian government to declare openly 'before all other nations,' that they 'take Tibet under their protection from England and China' (Andreyev 2003:44). According to Russian sources, the Dalai

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<sup>36</sup> Similarly, Curzon (1907) stated: 'Had the Tibetans respected our Frontiers, we should never have marched three years ago to Lhasa.'

Lama claimed that he could bring ‘all the Central Asian tribes as far as the Tibetan frontiers, under Russia’s rule’ (Andreyev 2003:44). However, shortly after withdrawing from Lhasa, Britain began negotiating an adhesion agreement with China in order to cancel the political damage caused by the expedition, and Russia was uninterested in intervening once British threats to Russian interests had subsided.

In 1906, an agreement was reached by which China paid off the entire indemnity imposed on Tibet by the 1904 Lhasa Convention. Britain also agreed that China was to be exempt from Article IX, which barred foreign powers from Tibet without British consent. China’s exact role was, however, left undefined. This changed in 1907, when Britain concluded a bilateral treaty with Russia in which both powers recognised China’s ‘suzerain’ role in Tibet. At this point, the British had superficially succeeded in arranging matters as they wished. The 1907 treaty placed a bar on both British and Russian expansionism in Tibet, thus securing Tibet’s role as a neutral buffer state. Furthermore, by recognising an influential role for China, both parties could be secure in the knowledge that Tibet was not free to independently subvert that agreement. The way was left open, however, for future Sino-Tibetan conflict. Tibet repudiated all the treaties to which it was subject, but in which it had not participated. China meanwhile, sought to strengthen its regional position, ever wary that not only did Tibetan assertiveness challenge China’s role as a regional power, but also that, at any moment, Tibet might fall to a more dangerous enemy.<sup>37</sup>

### **3:6 Beyond the Pass: From Unbounded Empire to Nation State**

Writing on the status of frontiers in international law, Lapradelle concludes that ‘the modern legal concept of a frontier was impossible in the great empires of the past, because the very essence of their existence was that they thought of themselves as continually expanding to become universal empires’(Embree 1977:258 ). Similarly, Kristoff argues that whilst a frontier was ‘the vanguard of a forward-moving culture bent on occupying the whole area. A boundary indicates, on the contrary, an enclosing, a shutting in.’ Hence, a boundary suggested, ‘the present concept of state, that is, the state as a sovereign, or autonomous spatial unit, one among many’ (Embree 1977:258).

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<sup>37</sup> As one imperial Chinese official put it, ‘[Tibet] has long been coveted by the British...should we prove remiss, the teeth will feel cold when the lips have gone’ Norbu 1992:42.

The case of Qing China and Tibet, however, suggests that a concept of a fixed boundary, analogous to those of modern international law, could exist within the context of a 'universal empire.' On the one hand, the Qing recognised fixed borders, and this implied a mutual acknowledgment of sovereignty by the political entities adjacent to the border. On the other hand, the Qing dynasty was founded upon a Confucian ideology that posited an all encompassing universalism. At the heart of this paradox was the necessity that Manchu emperors negotiate between Confucian orthodoxy and barbarian heterodoxy.

Cultivating the identity of a universal monarch was one of the ways that earlier Manchu emperors were able to manoeuvre between the heterodox and orthodox in the context of the empire. This concept had slightly different resonances in the Confucian and Buddhist traditions, but the overarching image of the emperor as sovereign of the universe provided a means for accommodating the various cultures that straddled the frontiers of China proper. Qianlong, in particular, had sought to articulate a universal basis of culture by promoting multilingual projects, and was himself a talented linguist. Arguing that an understanding of the concept of 'heaven' was cross-cultural and independent of language, Qianlong maintained that 'once the names are unified, there is nothing that is not universal.'<sup>38</sup> Writing in 1781, Qianlong linked his study of the Uyghur language with the pacification of the Western Regions, and his study of the Tibetan language with his pacification of Jinchuan, an ethnically Tibetan borderland in Western Sichuan that lay beyond the control of the Lhasa government (Berger 2002:195).<sup>39</sup>

Despite the link between Qianlong's study of frontier cultures and his pacification of certain frontier territories, it does not necessarily follow that the court was motivated in these projects by a desire for political assimilation. Berger, for example, argues that it is 'difficult to maintain that the Manchu emperors' increasingly easy multilingualism and their continued interest in and respect for cultural difference (certainly up to and including the Qianlong reign) was an epiphenomenal by-product

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38 Kristoff, Ladis. 1959. 'The Nature of Frontiers and Boundaries.' *Annals of the Association of American Geographers* 49, 270. Cited in Embree 1977:258.

39 The importance of the Jinchuan conquests are indicated by the fact that Qianlong included them in a list of the ten great military accomplishments of his reign (Waley-Cohen 1996:869-870), but it is notable that he did not allude to any conquest of Central Tibet.



of their political needs' (Berger 2002:6). Millward too goes on to present a more complex picture of Qing conquests in frontier territories, by showing how the boundaries between the different culture blocs that made up the Qing Empire were strictly maintained 'lest excessive, uncontrolled contact lead to trouble' (Millward 1998:202). Administrative structures and legal regulations enforced pre-existing cultural and geographical boundaries between Inner China and frontier cultures and actively discouraged the dilution of Han Chinese identity<sup>40</sup> Although Millward's study deals with Xinjiang, many of his observations are relevant to Tibet. In particular, his conception of the Qing Empire as a confederation of distinct cultural blocs draws attention to the paradoxical juxtaposition of the empire's universalising moves, embedded in Qianlong's desire to 'proclaim the supremacy of the unified linguistic universality of our dynastic house' and the particularism rooted in a frontier policy that was designed to both distance and control frontier cultures, whilst maintaining the traditional boundaries of the preceding Ming Dynasty's eighteen provinces (Millward 1998:197).

The paradoxical simultaneity of Tibetan inclusion and Tibetan exclusion opens up a window to explore the changing role of the frontier in the late Qing. The Qing frontier has not generally operated as a 'unit of historical enquiry' (Millward 1996:120). As Millward states in his studies of Xinjiang, an 'investigation of the frontier as 'process' is precluded by the historical treatment of the region as a static, eternally Chinese place' (Millward 1996:120). Yet the concept of the frontier changed radically at the end of the Qing dynasty, as nationalism became the dominant political ideology. The demarcation between the eighteen provinces that made up the 'Inner Land' of the Qing, and the territories 'beyond the pass' became increasingly blurred in Chinese nationalist discourse. One of the most important points about this expansion of the inner frontiers of the Qing at this time was that it occurred initially on a conceptual plane. The project to reconceptualise the greater Qing Empire as the Chinese Nation-state did not involve a corresponding increase of substantive political or military control in Central Tibet.

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<sup>40</sup> Legal regulations concerning cue-clipping, sexual activity and money all enforced the separation of those from China proper from those from 'beyond the pass' Millward 1998:203.

The concept of the universal empire thus completed its transition from symbol of unbounded power to relic of the premodern past. In this sense, what the newly emerging Nationalist discourse reflected was the Western image of the Qing Empire as 'unbounded' until it encountered the reality of Western intellectual, cultural and political frontiers. Although the image of an 'unbound' China is suggestive of power, in that those who touched it were supposedly spontaneously Sinicised, it also suggested an image of an Imperial Court that was as blind to its own limits as it was to the reality of a changing, modernising exterior world. In this construction, it was not until China encountered the West that it gained the self-knowledge necessary for modernisation. However, actual Qing usage and adaptation of universalising Imperial narratives to suit particular political exigencies, including the recognition of fixed borders, problematises this view. As Millward points out, 'the Qianlong-era ideology of empire differs profoundly from that held by Han Chinese of the Ming or Republican periods and, indeed, from that attributed to the Qing by the 'Chinese world order paradigm' (Millwood 1998:197). However, the real irony is that as the Nationalist Republic of China set about dismantling the edifice of the Qing's political cosmology, and rebuilding the nation on a modern platform of science and constitutionalism, it did so by constructing an arguably much more totalising mythology than the one it had usurped.

## Chapter Four

‘There is the old well-known story about the man who, during the Lisbon earthquake of 1775, went about hawking anti-earthquake pills; but one incident is forgotten – when someone pointed out that the pills could not possibly be of use, the hawker replied: ‘But what would you put in their place?’’ (Namier 1939:8).

### 4:1 Introduction

The purpose of this chapter is to examine how Imperial China’s engagement with Western Imperialism was transformed by the modernising moves of the Republic of China into an affirmation of the universal standards of civilisation that had arisen within Europe. Despite the fact that resistance to imperialism was the primary campaign platform of the Chinese Nationalists, the extensive transplantation of Western theories and methods of law and governance into China during this period renders this resistance contradictory. As well as throwing the revolutionary emphasis upon the separation of Western techniques from Western civilisation into question, the circularity of modernity created paradoxical sympathy between China and the West. The notion that legal and political systems operated at a supra-national level, leaving the uniqueness of the nation intact, finds a parallel in European positivist attempts to separate law from politics. The impossibility of maintaining such a distinction in the face of actual state practice is illustrated by the problematical rise of the *rebus sic stantibus* principle, a doctrine that throws into relief the contradictions inherent in the Chinese Nationalist project to create a modern nation-state from the ashes of the empire. The circulation of modernity in Chinese nationalism is informative in that it reveals an interface between an assumedly superior set of modern, universal normative values and traditional culture, but more than that it offers interesting grounds for later consideration of the failure of Tibet to fulfil the ‘standard of civilisation.’ The translation of traditional relations between Tibet and China into the terms of international law was uncompromising, and for the survival of Tibet as a self contained legal jurisdiction and political entity, catastrophic. The question of what it is to be modern, and what it is to be civilised, is as central to this as any concrete material considerations concerning actual state power.

To introduce the beginnings of the Nationalist era in China in the broadest of brushstrokes, by the end of the nineteenth century, Qing China witnessed increasing unemployment, heavy taxation and a large floating population of both disbanded soldiers and civilians displaced by natural disasters. These factors, in themselves enough to stimulate growing social unrest, were compounded by a policy of economic and military decentralisation. The result was an increasing dilution of meaningful control by the central Qing court. Beset by internal rebellions, foreign pressures and courtly intrigue, the imperial administration began to fragment. This led to increased competition for provincial control, which in turn perpetuated the destabilisation of the Manchu regime. Distracted by internal rivalry, the court moved slowly to implement the reforms demanded by critics. In the meantime, warlords, revolutionists and bandits were able to take advantage of the replacement of the centrally administered military with temporary provincial militia and foment pockets of resistance. Government reforms, when they came, proved to be too little and too late. Furthermore, foreign imperialism was a continuing thorn in the government's side, with Russia and Japan competing to turn Manchuria and Mongolia into zones of influence, and Britain making moves to both consolidate a system of Himalayan buffer states along its Indian frontier and to press for commercial advantage in the treaty ports, alongside other Western powers.

To summarise, the rapidly changing geo-political context in which the Qing Government sought to conduct its foreign affairs led to the breakdown of Qing influence over traditional tributary states, whilst domestic disorder weakened its internal administrative structure. The possibility, or extent, of a causal linkage between the internal and external elements of these upheavals has been approached from various angles, but a general thread running through accounts of the demise of the Qing Empire is that it was the burden of pressures to modernise that irreparably fractured the administrative structure of the regime. What reforms could, or should, have been implemented to stave off crises are matters of conjecture, but by and large the inevitability of the Qing demise seems agreed upon. The fact of the Qing regime's demise is, after the event, seemingly proof enough of the regime's lack. It is this notion of inevitability that I wish to examine, even contest. The point here is not to suggest that the Qing court was victim of external circumstance, nor that the court was possessor of an inherent worth grossly overlooked by modernity, although one might

wish to concede the partial truth of these points. The relevance here is, in the words of Koskenniemi, that it suggests that ‘the limits of our imagination are a product of a history that might have gone another way’ (Koskenniemi 2001:5). Somewhere between the notion of the inescapable force of the modern and the fact of actual historical change lays the thought, emotion and action of human individuals. In this sense, ‘inevitability’ renders humanity mute.

This follows on from the observation in the previous chapter that the ‘Chinese world order paradigm’ described the Qing Empire as ‘unbounded’ until it encountered the reality of Western intellectual, cultural and political frontiers (Millwood 1998:197). This paradigm narrates China’s encounter with the West as an epiphanic episode through which it gained the self-knowledge necessary for modernisation. In this respect, what is of issue is not whether or not foreign imperialism is seen as an exploitative and violent force, although there are indeed strong reasons to say that it was. Rather, it is that a global tide of modernity swept through the Qing Empire, awakening the old regime from evolutionary stasis. In its wake came the creation of a new myth – that of the modern nation. The irony is that whilst the Chinese Nationalist movement allied itself with a world wide movement against foreign imperialism, the circulation of modernity that was involved reinforced, indeed obscured, the fact that modernity was not an inevitable event, so much as a universalising ideology created and sustained by human contingency. It is this circularity of modernity, as a discourse, that makes the Chinese Nationalist revolution a truly global event. What began, within China, as a culturally centred moment of resistance and response to multi-faceted cultural forces, both internal and external, ironically became a testimony to the universal legitimacy of modernity and the stream of values and ideals that it encompassed. Thus, the fact that there was a national revolution in China at all becomes suggestive of modernity being the only valid paradigm for social organisation.

#### **4:2      Modernity as Myth**

The Nationalist project to seek the termination of the unequal treaty system was closely allied with a plan to modernise according to Western models. This was made explicit by the requirements of the Commission on Extraterritoriality in China,

set up by the Washington Conference in 1921, which specified modern legal reforms that had to be implemented before extraterritoriality ended. The transplant of the German Civil Code, chosen by the republic following the successful example of its transplantation in Japan, was related to this project. This returns us to the issue of the 'standard of civilisation' and what this standard meant to the historical construction of an international platform regulated by law. This became an arena which allowed no spectators, only participants, and the journey of the new modern nation into the folds of the 'civilised family' of nations is a journey replete with ironies and contradictions. Thus, Japan in its challenge to Western Powers at the turn of the twentieth century, 'made it necessary that the standard be articulated in specific legal terms,' hence formalising the existence of the paradigm it was challenging (Gong 1984:29). This draws attention to the circularity and contingency of the normative foundations of so-called international society. It also highlights the presence of a presumed epistemic and moral system upon which the concepts of law and nation are to be grounded, a presumption that circumscribes resistance. The argument to be developed here is that the epistemic limits of modernity have constructed what Fitzpatrick terms a mythology of law. Or, that 'The history of what modern law is not, becomes also a history of what it is. This is the outcome of mythic dynamics that both propel the linear progression of law, and of society, and provide the standards whereby some are judged as having progressed less than others' (Fitzpatrick 1992:107).

There are a number of points in relation to this. Firstly, to emphasise the epistemic circularity of modernity rather than its progressive linearity is to emphasise its cultural contingency and fluidity. To speak of modernity is to speak not just of a post-industrial age marked by certain material developments; modernity encompasses a discourse on the theoretical underpinnings of Mankind's progress. By the end of the nineteenth century, concepts of race and time had already been radically altered in light of Darwin's *Origins of the Species* and Lyell's *Principles of Geology*. The subsequent development of modernity's universal theory of progress, as traceable through the work of thinkers such as Marx, Kant and Descartes, coalesced to form a discourse of grand narratives. Despite divergent political positions, such theorists gave credence to a belief that the telos of history is realisable through objective reasoning. However, the position of modernity is somewhat altered by the discursive practices which have later defined it. For example, Marx's theories may be seen as integral to

the formation of modernity, but the discourse of modernity, as a universalistic theory of post-industrial social and economic change, is significantly removed from the particular historical moment within which Marx, as a contributor, formed his opinions. This creates a gap or lag whereby modernity's theoretical contradictions become visible, hence Fitzpatrick's assertion that for modernity, 'denial is the myth' (Fitzpatrick 1992:ix).

Secondly, to question the validity of modernity's 'myth of progress,' the dialectic in which civilisation moves towards an ever more perfect state of knowing, is to start from the assumption that modernity as an 'ideological event' differs from modernity as a 'historical event.' It raises from the shadows those on the margins, the local and the particular, where the experience of a lived event may be contradictory to that of the historically received idea of the event. The revisionist use of history for ideological or political ends is, of course, nothing new. However, critiques of modernity do suggest that in the post-Enlightenment era there was a discernible shift in the nature of legitimation. Modernity as an epistemic system is arguably self-replicating, its own claim to objective rationality becoming the sole measure by which it can be judged. The manifestation of this concept of rationality can be seen in the increasing restructuring of social institutions, as analysed by Foucault, which involved a decentring of the locus of power and a move towards the creation of an individual subject that 'does not pre-exist the imposition of power, but rather it is power which creates the individual in the first instance' (Litowitz 1997:69). A shift in the context of the historical overview to include the notion of a decentred subject is relevant to this thesis, for if one is to follow Foucault on this point, then:

We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals.' In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production. (Foucault 1995:194)

What Foucault reveals in this argument is that laws and regulations based on a system of rights do not so much protect the subject from state power as legitimate his/her subjugation to it. 'Rights should be viewed, I believe, not in terms of a

legitimacy to be established, but in terms of the methods of subjugation that it instigates' (Foucault 1980:96). This becomes relevant in consideration of international law's normative vision to protect universal human rights, not only in relation to the U.N Charter, but also with regard to the preceding legal principle of a 'standard of civilisation.'

It is, after all, arguably this 'standard' that shaped the formation of Chinese Nationalism, and ultimately underscored the eventual failure of the Tibetan nation-state.

One further preliminary point will be made here, and that is that unlike Qing China, Tibetan culture was specifically grounded in a philosophy which denied the existence of a permanent, autonomous self. Whilst this may not be quite the 'death of the subject' envisioned by Foucault, it does reveal the fissure between the modern nation, as the vehicle of rational progress, and a culture in which the concept of progress is understood in a different analytical framework. The ethic of Modernity centres on a harnessing of the power of the subject for rational societal development, and in this the institutions of the state, products of rational organisation and objective reasoning, are supreme. In this context, institutions of external discipline and control are not just expedient, but evolutionarily rational strategies. Whilst one can consider the monastic institutions of Tibet as vehicles of social discipline and political power, there is arguably a difference in that Tibetan Buddhist philosophy takes the position that externally imposed discipline and control are incapable of creating lasting peace. This is because the source of all conflict is seen to flow from a mistaken belief in the existence of a permanent, autonomous self. The modern obsession with creating ever more rational institutions is in this context, therefore, ultimately misguided. So, for example, to continually strive for a system of institutionally administered positive legal rights, grounded in universal reason, fails to adequately address the issue of responsibility. And, responsibility is ultimately to be addressed in the context of the individual stream of consciousness and an understanding of the laws of cause and effect, rather than through mechanisms of social discipline. The argument here is that whilst the concept of objectivity and rational science did exist in Tibet, the analytical paradigm in which it was understood, in which it achieved represented value, significantly problematised the transition to the modern state and, by extension, entry



into the family of nations. This underlines a point central to this current chapter, which is that the concept of rationality is exactly that: a concept.

In terms of the ethics of modernity that drove the formal creation of the entity defined as the Republic of China, this is evidenced as a contradictory moment of resistance to, and appropriation of, a non-indigenous epistemology. The Nationalist Government's promulgation of laws to regulate popular religion, part of a project to both resist foreign imperialism, and to cultivate a national identity founded on science and rationality, is one example of this to be explored. The republic's expansive appropriation of entities on its fringes, such as Tibet, can also be seen as conforming to this process. It affirmed both the republic's refusal to allow economic and military infiltration to destabilise its borders, and its commitment to promoting the existence of a civilised, modern society. The definition of the 'standard of civilisation,' a dynamic force in international law during the formative years of the Republic of China, may have been challenged by the push for inclusivity on the part of such entities as China, but nonetheless the foundational requirements for this 'standard' remained predicated upon an epistemology that originated in the culturally specific terrain of Europe. The expansion of international law, and the extension of rights, becomes somewhat contradictory in this context.

#### **4:3 China's Engagement with International Law in the Nationalist Era**

In 1936, the centennial edition of Wheaton's 'Elements of International Law' was published as part of the classics of International Law Series. The editor, George Wilson, draws the reader's attention to the existence of foreign language translations of the treatise. In particular, Wilson notes that the 'edition published in China was quickly exhausted' and that 'the work has been received with much favour in Japan. An edition of this Chinese text reprinted and adapted for Japanese use was published in Kyoto, Japan in 1865, and other editions are issued in the east' (Liu 1999:127). As Lidia Liu points out, 'Wilson cites the existence of the foreign language editions as evidence of the universal value of Wheaton's text, but it requires the circulation of that book to prove the self-same universality.' Liu goes on to argue that 'the coming into being of a global universal can be plotted as a series of translated and contested moments in colonial and cultural encounters, in which the translator, who literally and

figuratively plays the ‘diplomat,’ is a central agent’ and observes that ‘it is not untypical of an editor to cite the existence of foreign-language translations to prove the universal value (not merely the applicability) of a book. What it suggests is that later and revised editions can be just as illuminating as the original work in registering the process whereby, in this case, international law has been globalised and universalised over the past two hundred years’ (Liu 1999:128).

Officially sanctioned by the Zongli Yamen, in 1864 Henry Wheaton’s ‘Elements of International Law’ had been the first book on international law to be translated into Chinese. Known to the Chinese as *wanguo gongfa* it was the work of the American missionary W.A.P Martin and his Chinese co-workers.<sup>41</sup> The purpose of the translation from the Zongli Yamen’s point of view was to gain familiarity with the doctrine that had given rise to such legal principles as extraterritoriality, most-favoured-nation clause and tariff control, all of which had been forced upon China in the unequal treaty system. In other words, the Zongli Yamen saw *wanguo gongfa* as a practical guide to dealing with Western states. In a similar manner to Wheaton himself, in fact, the court viewed this international law as European law, the purpose of which was to govern European practice. As Prince Gong argued, memorialising the throne in 1864:-

We your ministers, find that this book on foreign laws does not entirely agree with our own laws, but there are in it occasional passages which are useful. For example, in connection with the case of Danish ships captured by Prussia outside of Tianjin, we used some sentences from the book without expressly saying so, as arguments. The Prussian minister acknowledged his mistake without saying a word. This seems a good proof. (Liu 1999:145).

Aside from arguing the practical value and diplomatic applicability of international law, Martin stressed to his Chinese detractors that knowledge of Western law did not give rise to automatic obligation. Hence, Prince Gong was encouraged to assert that, despite George Staunton translating the *Da Qing Luli* (the collected statutes of the great Qing dynasty) into English, ‘China never attempted to force Western

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<sup>41</sup> Martin went on to translate Woolsey’s ‘Introduction to the Study of International Law’ (1878), Lardy’s ‘Le Droit International Codifié’ (in itself a translation of Bluntschli’s 1879 work ‘Das Moderne Völkerrecht der Civilisirten Staaten’ and Hall’s ‘Treatise on International Law’ (1903). See Liu (1999).

countries to practice them,’ and that therefore, ‘it cannot be that just because a foreign book has been translated into Chinese, China would be forced to practice it’ (Liu 1999:145, Covell 1978:145-7). This assertion of reciprocity is interesting in that it affirms the instrumentality of the law. In retrospect, it also seems extraordinarily naïve, particularly in view of the fact that at that time China had already been forced to agree to a punitive series of treaties. However, precisely because it affirms the instrumentality of the law, Prince Gong’s argument also highlights that the expansion of the international legal sphere was the product of confrontation, resistance and contest. If the translation of international law is what made international law become truly international in usage, it was a result of this process of confrontation, rather than an outgrowth of the recognition of law’s universal veracity. Lidia Liu references this dynamic in relation to the actual act of translation between the Chinese and English languages, arguing that ‘reciprocity and commensurability are in every sense a product of deictic encounters between the two languages and not the other way around’ (Liu 1999:145).

The self-fulfilling prophecy of international law’s universality, so evident in the circulation of its texts, is mirrored in the development of the doctrine of the standard of civilisation. For the Republic of China, the standards of civilisation were of specific import. The ‘civilised powers,’ including Japan, had explicitly organised themselves against the Boxer Rebellion of 1900 in the defence of ‘civilised’ society. The indemnity imposed in the peace settlement of 1901 and inherited by the republic had added weight to criticism of the Imperial Qing Government. Japan’s involvement was of particular significance, as its concerted persistence in attaining the standard was seen as instrumental to its rapid imperial expansion. Japan’s success also added insult to injury in light of China’s concessions to the Powers. This was brought to the fore following the 1894 Sino-Japanese War, in which Japan sought control of the Qing tributary state of Korea. In the conflict, Japan, the victor, secured the respect of Europe for its stringent application of the law of war. The military defeat suffered by China was compounded by the fact that this acclaim was in direct contradistinction to the international criticism levelled at China for failing to uphold the same laws (Gong 1984:18).

To talk of the Republic of China as an entity perhaps gives an inaccurate impression of the unity of the state in the republican era. The revolution of 1911 led directly to the inauguration of Sun Yat-sen as Provisional President of the new Republic on the 1<sup>st</sup> January, 1912. However, despite widespread opposition to the Manchus, there was little collaboration between the provinces. Whilst the southern provinces had declared independence from the Qing dynasty, most of the Northern provinces had not (Li 1964:255). In light of the lack of unification, Sun stepped aside to allow Yuan Shih-kai to take the presidency, a reformer who had been appointed premier of the imperial cabinet under the Manchu's. As well as the support of the reformers within the previous administration, Yuan had the significant advantage of commanding the New Army in North China. The position of president was subject to the checks and balances of a modern-style parliament and cabinet, as outlined in the Provisional Constitution of 1912. However, Yuan asserted increasing autonomy of rule, going as far as to declare himself Emperor in 1915. This resulted in a split between the Yuan Government in Beijing and the revolutionists, led by Sun Yat-sen. By 1921, Sun Yat-sen was leader of a rival military government at Canton in the South, set up by the Kuomintang Nationalist party (KMT). Throughout this period, it was the Republican Government in Beijing who received foreign recognition as the legitimate regime. On Yuan's death in 1916, China fragmented into regions controlled by various rival warlords, although the Beijing Government continued to operate as the recognised leadership of China. This changed in 1928 when, following Sun Yat-sen's death in 1925, Chiang Kai-Shek's New Revolutionary Army successfully seized control for the KMT. Between 1928 and 1949, the KMT governed a unified China, until the success of the Chinese Communist Party in the ongoing civil war led to the retreat of the KMT to Taiwan. Regarding the republic's relation to Tibet, despite this lack of stability, there was a consistent official policy, the position being established in Article 3 of the Provisional Constitution of 1912, which stipulated: 'The territory of the Chinese Republic consists of 22 provinces, Inner and Outer Mongolia, Tibet and Chinghai [sic].' Likewise, both the Northern and the Southern regimes continued to pursue the termination of the unequal treaties. The two projects were intrinsically linked, both an expression of the Nationalist emphasis on a strong sovereign state identity, and both tied to the concept of the standard of civilisation in international society.

#### 4.4 The Standard of Civilisation

The abolition of the unequal treaties in many respects became the cause celebre of both the Northern and Southern regimes. It captured the fundamental imperatives of the revolution; the removal of a defunct government whose own imperial weaknesses were seen to have allowed foreign imperialism to encroach upon China's sovereignty. By taking advantage of changing international attitudes towards self-determination in the post League era, the Nationalist Government was able to assert its difference from the old regime and claim its place as rightful representative of the Chinese nation. Naturally, this was much more than a struggle over China's status in the emerging global nation state system, for it was also a platform on which rival parties could campaign for legitimate domestic rule over a unified China. In both aspects, internationally and domestically, the concept of 'being modern' became central to the articulation of power.

To date, the most comprehensive analysis of the standard of civilisation in international law remains that by Gong (1984), who places the standard at the centre of the development of contemporary social, legal and institutional structures that shape international society. The impact the standard had upon the development of international law has achieved increasing recognition since Gong's study, particularly in light of recent developments regarding international intervention in 'rogue' states, and also as part of the debate on the normative vision of international law, especially relating to human rights and development (Simpson 2004, Rajagopal 2003). The purpose here is to examine how the standard shaped the international relations of the Republic of China, and also to consider the circularity of the concept as it moved across cultural boundaries, what was initially a particularistic demarcation of difference becoming an affirmation of universal norms and values.

By the end of the nineteenth century, the standard of civilisation had become the organising principle upon which the European powers, and the United States, declared international society to be founded. This concept of an exclusive 'civilised' international society was articulated in an array of literature from publicists of the day and sees clear expression in various agreements relating to such matters as European consular jurisdiction in non-European territories. Generally speaking, the standard

envisioned the state protection of life, property and freedom of conscience (in particular for foreign nationals), the rule of law and stable government, and adherence to international obligations. The standard also operated in the domain of social custom, excluding from the civilised sphere, for example, customary laws of marriage based on polygamy. Dress was also perceived as a measure of civilisation that could bear diplomatic significance, as exemplified by the Japanese diplomatic mission to the United States in 1871 (Gong 1984:20).

The significance of the standard is discernible in the debates over what comprised appropriate humanitarian rules for warfare when the civilised nations convened at The Hague Peace Conference of 1899. The British delegate justified the use of dum dum bullets to the Sub-Commission to the First Commission of the Conference, with the argument that ‘there is a difference in war between civilised nations and that against savages’ and that in the case of savages use of the bullet was justified for ‘the savage...although run through two or three times, does not cease to advance’ (Coupland and Loye 2003:137). This distinction remained part of British practice as late as 1914, with the 1914 British Manual of Military Law stating that ‘rules of International Law apply only to warfare between civilized nations... They do not apply in wars with uncivilised states and tribes’ (Mazower 2006:557). At the heart of the concept of the standard was the Darwinist notion of evolutionary development, which when applied to the macro level of civilisation, rationalised hierarchical distinctions between peoples by collapsing the particularities of inequality into the universalistic model of progress. In this vein, the Hague Conference of 1907, notable for its inclusion of China, Siam and the South American States saw its purpose as ‘the interests of humanity, and the ever progressive needs of civilisation’(Mazower 2006:558). Despite the universalistic presumptions of the standard, the fact that it remained aspirational and that political entities had either attained the standard or not, ensured that it was anything but. Indeed, in its initial construction, the only states to have gained this universal standard were the very same states that had delineated its existence in the first place. Whilst such posturing was not a new event in international relations, as might be observed from the discussion of the Universal Qing Empire in the previous chapter, the expansion of European commercial and military reach extended the scope for the standard as a foundational principle for international society. As engagement with the standard was ostensibly the only means by which non

European entities could gain recognition as fully sovereign states, a process was set in motion by which the expansion of international society became proof of the universal applicability of the standard on which it was based. This process of explicitly demarcating between the civilised, semi-civilised and uncivilised world became increasingly formalised and rationalised through reference to law.

Whilst recent opinion has cautioned against attributing this development specifically to the rise of positivism in European jurisprudence, the act of codification in positive law clearly served as a demonstration of the a priori existence of what was an otherwise rather fluid normative concept. After all, the adherence to international legal standards and the capacity to grasp the complexities of such law were in themselves presumed a measure of the degree of civilisation. That the capacity for valid legal reasoning was something uniquely beholden to the civilised was indispensable to the positive international law tradition. Indeed, the structure of international society was founded upon this assumption, for without this initial argument the validity of international legal doctrine would not hold (Anghie 1999).

In the Austinian tradition, positive law necessitated a sovereign hence Austin's famous denial of the existence of international law. Rather, what existed in rules of customary practice and voluntary agreements was positive international morality, the practice of which was subject to the vagaries of individual state will. In the absence of an international sovereign to define or enforce positive law, the result was a system which was, as Rousseau said of the Public Law of Europe, 'full of contradictory rules which nothing but the right of the strongest can reduce to order: so that, in the absence of any sure guide, in case of doubt reason will always incline in the direction of self-interest' (Morrison 1997:240). If positive law depended upon the coercive power of the nation state, then in this framework so too did the progress of civilisation. For organised political society, within which law operated, was according to Austin, superior to a society 'in the state of nature,' within which positive law did not exist.

For an era in which positivism held sway, the doctrine of the standard of civilisation arguably served to smooth over the contradictions inherent in international law's lack of a sovereign. Whilst an overarching sovereign was not identifiable, the

flow of authority could be seen to spring from the standard of civilisation. Moreover, this standard was identifiable in the actual practice of the states that comprised Europe. Civilisation as a complex phenomenon that emerged from the actions of society was, in this sense, central to sovereignty itself and the wellspring of law's command. It followed that the uncivilised were, ipso facto, without law and somewhat less than sovereign. Although the exact demarcation of which peoples were subjects of international law and which were not shifted over time and between jurists, this fundamental distinction became key to late nineteenth century jurisprudence. This line of positivist reasoning led in its most extreme form to the opinion that because law could not be understood by lesser civilised states, that it was 'discretion, and not international law, according to which the members of the Family of Nations [were to] deal with such states as still remain outside that family' (Anghie 1999:24). The notion that international law was in essence the public law of Europe therefore persisted for considerable time after Bentham's first construction of the phrase, hence the irony of Wheaton's cross cultural translation later being taken as evidence of international law's inherent universality. For Wheaton was clear on this point: there was no universal law of nations (Wheaton 1916: 14-17).

This offers a point of return to Austin's conception of a superior civilisation being one that could first conceive of, and then subject itself to, the dictates of 'political society.' The refusal, or inability, to be bound by such laws as found in a political society was due to ignorance and further signalled incapacity to develop an appropriate and fixed relation to property. Hence Austin's succinct conclusion that in the state of nature 'men...have no legal rights' (Austin 1998:196). This is the now familiar conceptual context for Europe's civilising mission and formed part of its claim to colonial possession in the uncivilised world, achieving memorable formal articulation in The General Act of the Conference of Berlin (1886), Article VI stipulating that the Powers agree to 'bind themselves to watch over the preservation of the native tribes, and to care for the improvement of their moral and material well-being,' this being part of the overarching objective of 'instructing the natives and bringing home to them the blessings of civilisation'(Gong 1984:76-77). Despite the prevalence of argument along such lines, the standard of civilisation achieved only a brief moment of juridical purity. After all, as Macaulay had observed in 1833, 'to trade with civilised men is infinitely more profitable than to govern savages,' an observation



borne out by the fact that by 1846 'British colonial defence cost the value of half colonial trade' (Koskenniemi 2001:111).

If free trade was more financially advantageous than direct rule, it follows that the rationale for imposing exclusionist policies derived from a strict interpretation of the standard of civilisation was somewhat lessened. Even if the grounds for exchange remained unequal, the interface between the European and non-European world still relied upon the existence of exchange and acts of translation. In this sense, consular jurisdiction, a practice so intrinsic to the Standard of Civilisation, facilitated such exchange. Despite the fact that extraterritoriality in China became such a potent symbol of the humiliation that China suffered at the hands of imperialistic foreign powers, it did not follow that the existence of extraterritorial enclaves was definitive of a lack of full sovereignty, or even that consular jurisdiction was of necessity a matter of public international law rather than domestic law. This was the primary argument of the Turkish delegation at the Lausanne Conference (1923), defending Turkey's unilateral right to terminate a capitulation treaty with America. In a reversal of the dynamics of the coloniser-colonised Ismet Pasha stated, 'Capitulations are essentially unilateral acts. In order that an act may be regarded as reciprocal, it must above all contain reciprocal engagements' (Woolsey 1926:347) The Turkish delegation also asserted that should the capitulations be regarded as bilateral agreements, then the right to unilateral termination would be affirmed by the principle of *rebus sic stantibus*. The rise and fall in the use of the *rebus sic stantibus* doctrine at the end of the nineteenth and beginning of the twentieth century illustrates clearly the dependence of international law upon international morality and society, something with which the standard of civilisation explicitly engaged, despite its positivist articulation.

The Turkish arguments defending unilateral action run contrary to such publicists as Lorimer, who asserted that consular jurisdiction was the inevitable legal solution to be imposed by civilised nations dealing with lesser civilised, partially recognised states. Subverting this relationship, the Turkish argued that a consular jurisdiction derived authority from the state bestowing the privilege, and could not be seen as evidence of a lack of that state's sovereignty. Whilst for Lorimer, 'colonisation, and the reclamation of barbarians and savages, if possible in point of fact, are duties morally and jurally inevitable; and where circumstances demand the

application of physical force, they fall within necessary objects of war. On this ground, the wars against China and Japan, to compel these countries to open their ports, may be defended' (Orakhelashvili 2006:319) For Vattel, 'There exists no reason why a nation or a sovereign, if authorised by the laws, may not grant various privileges in their territories to another nation, or to foreigners in general, since everyone may dispose of his own property as he thinks fit' (Orakhelashvili 2006:327).

In the case of China, there is evidence that the court viewed consular jurisdiction, and the unequal treaty system in general, as a way of containing the foreigners. Certainly it was still a compromise resulting from the compulsion of force, but nonetheless there were grounds for accommodating the development within the context of traditional Chinese practice, representing as it did imperial 'compassion for strangers coming from afar' (Teng and Fairbank 1979:37). The Republic of China witnessed, therefore, a significant shift from seeing international law as a language of diplomacy useful for negotiating with Europeans, to a technology capable of harnessing political power in the modern world. Whilst the Republic of China continued to resist Western imperialism, this being part of its revolutionary campaign platform, the radical sweeping away of the old order produced a contradictory moment in which the techniques of Western law and government were imported wholesale. No longer was the negotiation of difference between the civilisations made so clearly across the fault line of different systems of governance. Thus, whilst China was never in the same position as post-war newly created modern states bound by the doctrine of *uti possidetis* to create 'national myths and legends in a bid to secure a coherent 'national identity,' nationalism was nonetheless required to crystallise an identity that could withstand the assault of such institutional change (Castellino and Allen 2000:206).

This provides a point of comparison with the development of the standard of civilisation in Europe. Wheaton had exhorted the practice of international law as, primarily, a means of regulating relations between Europeans. Hall, following a similar line, saw China as an entity beyond the sphere of the family of nations and reasoned that its expectation that European states should act in accordance with international law in their dealings with China as a conundrum which could only be resolved by emphasising that European states were bound not by law but by 'their sense of honour'

(Gong 1984:61). To reason otherwise would be to admit jural capacity on the part of what was only a semi-civilised state.

The point here is that the standard of civilisation operated not simply as a discourse of subjugation in the colonial world, but as a means of reinforcing peace and stability in Europe, between European states. In post Crimean War Europe, sovereignty proved to be more prone to the vagaries of political fluctuation than the diplomatic order established in 1815 had mandated. The Congress of Vienna had preserved the balance of power in Europe, but it could not curb revolutionary movements on the continent. As individual states pursued unilateral 'high' policies, the scope for negotiation and regulation by treaty was reduced. The regime of binding international obligations that had maintained peace since the Napoleonic wars had failed to prevent the conflict of 1856, and by the 1860's was also subject to the pressures of increased competition between European states in the colonial context. If the power balance of the European treaty based system had become more precarious during the second half of the nineteenth century, nonetheless the fundamental conceptual separation of law and politics in diplomatic state practice remained a cornerstone of faith for publicists writing at this time, representing as it did the foundations of European public order. This order depended upon maintenance of the fundamental idea that treaties were contracts between equals, underpinning the sovereignty and independence of the parties involved. The realities of state practice in the global, non-European world were, therefore, something of a destabilising force. If the treaties of capitulation and extraterritoriality were contracts between equals, then non-European entities would have to be recognised on that basis, an event difficult to reconcile with the imperatives of colonial expansion. If they were not equals, then what were the implications of this institutionalised discrepancy upon the founding principle of state equality that bound the European powers to one another? The legal dilemma was how to reconcile the evidence of sovereignty in countries such as Persia, Siam Turkey and China with this necessity, not simply with the colonial imperative. Already the fact that European state practice relied increasingly upon treaties with non-European powers to protect existing colonial interests and expand their empires was a powerful contradiction to the juridical argument that non-European entities were beyond the scope of both law and civilisation. This contradiction therefore provides reasonable grounds for asserting that the practice of colonial states in this regard

threatened the fundamental basis of the standard of civilisation, an argument made by Anghie in his analysis of positivist jurisprudence and nineteenth century colonialism (1999:39). Simply put, the formal interaction of different governments across cultural boundaries did not suddenly cease because nineteenth century jurists considered it an intellectual inconvenience.

It is, I believe, useful to take this argument a step further. Rather than emphasising the fact that anomalous state practice threatened the integrity of the standard of civilisation, it can be considered that the standard was in part a means of reconciling the destabilising effect that treaties in the colonial context could have upon agreements between European states. Furthermore, the standard's reference to progress and universal norms still allowed for some regulation over the acquisition of colonial territory. For all its contradictions and inequities, the standard of civilisation was successful in policing the peripheries of international law and regulating the flow of the colonial encounter. Indeed, rather than falling before the reality of contradictory state treaty practice, the standard flourished at the end of the nineteenth century. In fact, the inconsistencies of treaty making were the foundations on which the standard derived its meaning. Inconsistencies could be set beyond the sacred sphere of European public law, along with any anxiety that rapid expansion of international law might precipitate a collapse of European Public Law and, along with it, peace in Europe. This adds a further dimension to critiques of international law that emphasise the racial exclusivity of international law and its Eurocentric origins. For all the evidence that international law of the nineteenth century was a systematic attempt to tame the uncivilised, non-European world, the existence of this world peopled by so-called savages allowed for, and reinforced, the notion of a community of European states civilised enough to respect obligations *between themselves*. International law of the nineteenth century can also be read as a project aimed at subduing Europe itself. The challenge to the stability of international law existed within Europe as much as it did without.

#### **4.5 The London Conference of 1871**

This is amply illustrated by the events surrounding the London Conference of 1871 which attempted in the form of a declaration to reconcile the doctrinal principle

of *pacta sunt servanda* with the contrary principle of *rebus sic stantibus*. The necessity of this arose from Russia's denouncement of the Black Sea Clauses of the Treaty of Paris (1856), under which terms the settlement of the Crimean War had been decided. Russia had used the principle of *rebus sic stantibus* to argue its right to unilaterally denounce the treaty in 1870 on the grounds of fundamental change of circumstance. Whilst *clausula rebus sic stantibus* ('things thus standing') can be considered an implicit reservation attached to all treaties, its use in the narrow sense, particularly with regard to the right of unilateral termination of an obligation, was a significant departure. The doctrine subsequently achieved only an uneasy status in law. However, Russia's actions paved the way for several legal challenges to the capitulation regimes and unequal treaty system in the early twentieth century. As with Russia's use of the doctrine in 1870, the success of arguments made on this basis seemed to depend upon political factors governing enforcement and expediency, rather than any clear appraisal of the principle as law.

It can be considered that when China invoked *rebus sic stantibus* in 1919, 1921 and 1926 to terminate international agreements, it did so with a view to not only restore equality, but to give expression to its existing legal capacity in the context of the standard of civilisation. In that regard, Beijing was pursuing a policy in line with that declared by Sun at the inauguration of the republic in 1912 'we will try our best to carry out the duties of a civilised nation so as to obtain the rights of a civilised nation' (Chiu 1972:244). It is notable, however, that the 1919 denunciation of the November 5, 1913 Sino-Russian treaty, and June 7, 1915 agreement between Russia, China and Mongolia regarding Mongolian autonomy involved agreements only recently entered into by the Republic of China. This differs from the arguments China made in 1921 at the Washington Conference, and again in 1926 regarding the Sino-Belgian Treaty of 1865, in that the 1919 renunciation did not involve agreements typically classified as unequal treaties. The treaties of 1913 and 1915 concerned the autonomy of Mongolia, an entity claimed by the republic to be integral to China, but which, like Tibet, had declared independence after the 1911 revolution. The Sino-Russian Treaty of 1913 followed on the back of Russia's recognition of Mongolian independence in the Russo-Mongolian Agreement of 3 November, 1912. In the subsequent treaty with China, Russia modified its position, whilst securing for itself a role in Mongolia by recognising China's suzerainty. This development parallels events occurring across the

border in Tibet, where British intervention led to the 1914 Simla Convention recognising Tibetan autonomy on the one hand and both China's suzerain role and British rights in Tibet on the other. Whilst in 1919 the Republic of China limited its cause for the denunciation of the treaties to change of circumstances regarding Mongolia's willingness to be autonomous, taking advantage of the weakness of the newly established Bolshevik government, it is clear that the contest over both Tibet and Mongolia was linked to Chinese views on imperialist encroachments generally, as an outgrowth of the Great Game, but also to the unequal treaty system specifically. It should be noted that Communist China enforced a stronger view of this issue, seeing equality as deriving not simply from legal textual expression, but from social and economic fact. Thus, 'whether or not a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the state character, economic strength, and the substance of correlation of the contracting states' (Chiu 1972:63).<sup>42</sup> The position of Communist China was that unequal treaties were by nature illegal and thus null and void, and for that reason the problem of whether the doctrine of *rebus sic stantibus* allowed for unilateral denunciation was avoided, the doctrine falling from use. The republic's usage of the *rebus sic stantibus* clause not only highlights some of the contradictions within the doctrine itself, but in the agenda of Chinese Nationalism as a whole. The invocation of *rebus sic stantibus* in 1919 asserted not only a unilateral right to terminate treaty relations, but the republic's unilateral right to Mongolia, an entity that, despite the wrangling of Russia and China, had declared independence in 1911 and entered into international agreements on its own behalf (Smith 1996:173).

This conflation of law and politics inherent in the use of the principle of *rebus sic stantibus* was inherent in its first articulation as a specific principle of international law in 1871. Russia's invocation of what had previously essentially been a creature of political theory, with its origins in the statecraft of Cicero, the theology of St Thomas Aquinas and the reaction to Machiavelli's first expression of *real politik*, was symptomatic of the fluctuating balance of political power in Europe at the time, despite Russia's framing of the issue as a matter of positive law. Indeed, the peace treaty of 1856 which Russia was challenging can be viewed in a similar light. Whilst 1856 was

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42 In line with this approach, the 1946 Sino-American Treaty of Friendship, Commerce and Navigation was seen by some Communist Chinese writers to be an unequal treaty, despite the fact that the treaty established reciprocal commercial privileges to China and America (Chiu 1978:63).

famous for bringing about the entry of the Ottoman Empire into the family of nations, an event often cited as the point when international law shifted towards being truly international, it is difficult to escape from the inevitable conclusion that the 1856 Treaty of Paris had been undertaken to reinforce the order of collective obligations established in 1815. The primary issue was not so much the expansion of international law as the shoring up of its existing boundaries.

The final declaration regarding Russia's actions ostensibly affirmed the concept that obligations were founded upon the principles of reciprocity, consent and good faith. It read: 'it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a Treaty, not modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement' (Bederman 1988:2). Nonetheless, despite this seeming restriction upon unilateral action, Russia's initial denunciation was affirmed by treaty at the same conference. As the Russian representative commented during the proceedings, 'in our time, treaties rarely live to a great age' (Bederman 1988:2). It is this reality that the London Declaration ultimately upheld, and as such the doctrine of *rebus sic stantibus* remained part of international law, even if its precise definition fluctuated over the course of the decades. To contemporary observers, the conference, in conceding as much as it did, represented a threat to the order and stability of the system. The editor of Wheaton's 1880 edition, A.C. Boyd, described Russia's action as 'utterly subversive of all international morality,' destined to bring about 'the end of all public faith.' As far as the subsequent declaration went, Boyd wrote that:

'it is melancholy to think that the most civilised Powers of the world should have considered it necessary to put forward such a declaration...it shows that international law, however much talked of and appealed to, has not yet acquired that moral force by which alone the welfare of nations in their intercourse can be secured.' (Bederman 1988:21)

Nonetheless, by the time of the League of Nations, the *rebus sic stantibus* had been somewhat rehabilitated. Woolsey, for example, interpreted the London Declaration in the context of the conference's acceptance of Russia's action as a confirmation of the principle of *rebus sic stantibus*, meaning 'that a treaty cannot be annulled by one of the parties without the consent of the other in circumstances which

involve no change in the fundamental conditions which the treaty is based and which show no violation of the treaty by the other party.’

This is what A.C. Boyd’s anxiety about international law’s lack of ‘moral force’ referred to; its inadequacy as a means for ensuring stability and maintaining the status quo. *Rebus sic stantibus*, in its challenge to the sanctity of treaties, writ this deficiency large. It is within this context that the standard of civilisation needs to be understood, as an outgrowth of the anxieties of a Europe in flux, threatened by its own expansion and competitiveness. It seems appropriate, therefore, that the doctrine became associated primarily with challenges to capitulations and unequal treaties in the early twentieth century.

To lay emphasis upon this dynamic of uncertainty, rather than bare-faced imperial arrogance, adds something to the analysis of the Republic of China’s interaction with international law. Whilst it does not lessen the inequalities inherent in the colonial encounter, it does create a space within which to understand the agency of the non-European world. It emphasises a locus of negotiation, however narrow or circumscribed, in which ‘victims’ are also actors. This is what recognising the artificiality of the civilised/uncivilised dichotomy means, since state practice, even across the rifts of the colonial encounter, could not support a clear distinction, based as it was upon such a fluid concept. The irony of this is that in the context of the Nationalist project, the notion that China was a victim of imperialistic desire was very much a foundational myth of the republic. If the standard of civilisation tells something of the self-perception and identity crisis of Europe, it also reveals much of how the Republic of China viewed its own position in the world. The intellectual Chen Tu-Hsiu, early revolutionary, May Fourth participant and later Marxist, wrote in 1915:-

‘I would much rather see the past culture of our nation disappear than see our race die out now because of its unfitness for living in the modern world...The progress of the world is like that of a fleet horse, galloping and galloping onward’ (Teng and Fairbank 1979:242).

This captured the driving impetus of the faith in progress, so typical of modernity at large, found amongst the Chinese intelligentsia in the early republic. The



provincial delegates at the inauguration of Sun as the provincial president in 1912 expressed much the same when they declared ‘We, the descendents of Han, have groaned under the searing oppression of the Manchus; and admiring the systems of equality of the American and French peoples, we have met and planned together...for the overthrow of tyranny and restoration of the rights of man’(Teng and Fairbank 1979:258). In this construction, the Manchus were the obstacle to China’s progress as a civilisation, the barrier that stalled the progressive linkage of the philosophy of the ancient sages with the systems of the modern world. Arguably, therefore, in asserting its own civilised identity, the republic transposed the dynamics of the standard of civilisation onto its own historical self. It is in this sense that the standard of civilisation became part of the myth in which the Nation of China was founded, and not simply because it was imposed from without. To transpose national weakness onto the past reinforced the notion of contemporary strength, becoming a powerful statement of state sovereignty. This process finds continuity in the PRC with communist assertions that Nationalist China remained at the mercy of unequal treaties, in particular the ‘so-called McMahon Line’ which demarcated the Sino-Tibetan border at the Simla Conference of 1914 (Chen 1974:190).

This faith in the modern political and legal technologies of the West, so clearly expressed in the Provisional Constitution of 1912, gave credence to the notion of a universal international law of nations. Whereas Prince Gong of the Qing dynasty accepted use of international law as an expedient mechanism of negotiation, he did not go so far as to claim it to be an expression of a universal standard of civilisation. In this he seems to have agreed with Wheaton in that international law was drafted by Europeans, for Europeans. Yet for the Revolutionists of the republican era, despite the Nationalist conception of racial uniqueness, the enthusiastic uptake of modernity implied just that. The admired systems of the American and French peoples were techniques universally able to further the progress of Mankind. The successful implementation of these systems may have depended upon the capabilities of the people, for according to Sun ‘the course taken by a nation is determined by the psychology of the multitude,’ but the systems themselves seemed to embody a standard of civilisation fundamental to progress (Teng and Fairbank 1979:267). This was not, therefore a superficial playing of the game to appease European tastes. It was an affirmation that the underlying values of Western models of law and governance

were applicable to all. The paradox of accepting such a position without accepting Western superiority on the basis of the West's advanced achievements in furthering such values was resolved by referring back to China's pre-Manchu philosophical tradition. This time-shift, however inadequate Sun's sweeping summary of Western political history seems, allowed the nation to uphold a token of tradition alongside its proclamation of modernity.

When Chinese delegates of the Beijing Government argued at the Washington Conference (1921-1922) for the termination of the unequal treaties on the basis of *rebus sic stantibus*, they did so from the assumption that China as a civilised modern state could claim protection of the doctrine as Russia had before it. The arguments put forward by the former Chief Justice of China, Dr. Wang, were clear on this point. Firstly, China had a modern system of codified law, revised and prepared 'with the assistance of foreign experts' and 'based on the principles of modern jurisprudence.' Moreover, there was a newly established system of law courts as of 1910 in which 'the judges are all modern, trained lawyers' and foreign law was 'given ample application' under supplementary laws such as the 'Rules of Foreign Laws (1918) which 'deals with matters relating to private international law' (Woolsey 1926:353).<sup>43</sup>

This alone arguably rendered the need for extraterritoriality obsolete, as it removed the primary grounds of legal incapacity to protect foreigners on which the principle was based. In addition, Wang argued that the tariff regime imposed upon China deprived China of her power to make reciprocity arrangements with the Powers and, moreover, that since its institution over eighty years previously, it had been inadequately and inefficiently revised despite fundamental changes in prices rendering it 'a danger to the political and economic existence of the Chinese state' (Woolsey 1926:352).

Wang also pointed out that the significant expansion of foreign presence in China, the original treaty ports rising to fifty by 1922, made a mockery of the extraterritorial imperative to protect the rule of law, for what had actually developed was a system of such jurisdictional confusion, replete as it was with a multiplicity of

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<sup>43</sup> Also in force were the Criminal Code, Code of Civil Procedure and the Commercial Code, which was partially in force.

courts, that ‘in many cases the rights and liabilities of the parties vary according to whether the one or the other sues first’ (Woolsey 1926:352). Despite the delegation’s efforts, the resulting Nine Power Treaty designed to address the Chinese problem fell short of meeting Chinese demands. Under Resolution V, the Powers set up a commission to examine extraterritoriality in China, which did not convene until 1926, when commissioners launched an inquiry in Beijing into the Chinese judicial system.

The resulting Report of the Commission on Extraterritoriality in China, emphasising the internal disorganisation within China, set forth a series of internal administrative and legal requirements that needed to be met before the Powers would relinquish extraterritorial rights, including the further revision and enforcement of various domestic codes, covering civil, criminal and commercial law (Commission on Extraterritoriality in China 1926). A supplementary settlement at the Washington Conference secured the withdrawal of Japan from the Shantung peninsula, a significant restoration of rights from China’s point of view, for there had been widespread public antagonism to the award of the previously German held treaty port to Japan at Versailles. Nonetheless, the treaty of 1922 did not lay down a timetable for relinquishment of extraterritoriality; it merely affirmed the general principle of China’s territorial integrity and right to development. A more cynical appraisal would be that the conference as a whole was primarily concerned with Anglo-American relations with Japan, and the Nine Power Treaty with establishing US Secretary of State John Hay’s Open Door Policy; hence, Wang Ching-wei’s conclusion that the conference ‘freed China from the Japanese policy of independent violent encroachment’ only to leave it victim to ‘the cooperative slow encroachment’ of all the Powers (Shurmann and Schell 1967:100).

Modification to the tariff system under the treaty occurred only within the context of abstention from special privileges in China and equality of opportunity to all Powers, this being a clear expression of the American Open Door Policy. This invariably was interpreted differently by different powers, but ostensibly it referred to commercial opportunity for the foreign powers in China and as such was not designed to address the issue of equality between China and the Powers. Given that Bolshevik Russia had unilaterally renounced all of the Tsarist unequal treaties regarding China in 1918, the outcome of the Washington Conference was perceived as a significant

comparative failure in China, particularly by the Nationalist Party which used the event to demonstrate the Beijing Government's incapacity. Given that it is possible to interpret Western motives in conceding as much as they did to China as part of an effort to mitigate Communist sympathies in China, it can also be seen as a failure on those grounds too. The Southern revolutionists, led by Sun, were keen to emphasise the failure of the Northern government's efforts to secure an end to the unequal treaties and looked to Russia for assistance. This ushered in an era of Soviet influence in the KMT, involving Russian provision of arms, finance and expertise. Meanwhile, Russia pursued relations with the Northern Government, concluding the Sino-Soviet Treaty of May 1924 in Beijing.

Yet, despite the unstable internal situation, including the varying influence of Japan over Beijing, and Beijing's need to maintain a flow of foreign finance, the Chinese representatives in Washington placed strong and relevant arguments before the powers. The lack of success says more about the status of positive international law in relation to international politics than it does about the delegation's capacity for presenting their case. The failure of China's arguments to secure the abrogation of the unequal treaty system compared with the Turkish success illustrates well how the process of dismantling the legal obligations created by the colonial encounter was, like the process of their becoming, subject to the whims and vagaries of state power. Likewise, the application of *rebus sic stantibus* by the Republic of China, with its emphasis upon consent and sovereign equality, is rendered contradictory by the imperialistic motives betrayed in the republic's unilateral claim to Mongolia in 1919 under the same principle.

## Chapter Five

### 5:1 Introduction

The preceding chapter developed the argument that, in its commitment to modernity, Nationalist China's resistance to imperialism served to reaffirm the foundational concept of a universal standard of civilisation in international law. This established a fundamental epistemological sympathy between China and the West which traversed the fissures of difference. Arguably it was this sympathy provided the grounds for Chinese resistance, with the narrative of that resistance being rewritten as part of the myth of the nation. Hence, China's use of the *rebus sic stantibus* doctrine to restore sovereign equality marked this contradictory moment, at once affirming the civilised legal capacity of the republic, whilst simultaneously making explicit the presence of subjective moral and social dynamics underlying international legal obligations.

If China's employment of international law affirmed the universal values of international society, then so too did international law shape the dynamics of power within China. As part of the republic's effort to restore sovereign equality, immense institutional changes were implemented in the name of modernisation, involving the replacement not only of courts and legislation so as to meet Western standards, but also the appropriation of village institutions as part of a drive to extract resources (see, generally, Duara 1991). One way of reading these changes invokes the notion that the processes of Western imperialism achieved continuity in the global reach of modern institutions, a view which finds support in an analysis of the League's Mandate Commission, for example (Rajagopal 2003: 37-71, Anghie 2006). However, it is clear that throughout the era of the republic, modernity was employed as a tool to legitimise increasing state intervention in daily civilian life. It is therefore inadequate to see modernity as imposed from without. It was also used to enforce and restructure power relations at the local level, becoming the legitimating factor of the state's drive to extract revenue.

In the context of later developments in Sino-Tibetan relations, and Tibet's international status, it is pertinent to recall Chatterjee's argument that 'the problems of a liberal doctrine of nationalism can be traced back to a much more fundamental question about the moral and epistemic status of bourgeois-rational conception of universal history' (Chatterjee 1998:11). If we are to assume that 'all forms of knowledge are born in historical society and become implicated with the dynamic of power in this society,' then in the modern economy of knowledge, the choice of discourse was a matter of profit to those administering political control (Duara 1991:68). Whilst it would be grossly simplistic to presume the spread of European modernist thought to be a straightforward transplantation of knowledge, nonetheless the extent to which European systems of knowledge were imported into China was both extensive and unprecedented. In the sense that these systems of knowledge were often described in China as 'technologies,' one may also consider them to be commodities. Paradoxically, this both complicates and reinforces postcolonial assessments that seek to portray the rapid spread of Western ideals in the nineteenth and twentieth centuries as a feature of cultural imperialism.

The drive to develop the science of administration in the framework of law, in its national and international aspects, circumscribed Tibetan resistance to foreign encroachment. It rendered the task of defending traditional institutions in the face of pressure to become modern a Hobson's choice. Independence required that the Tibetan state assert its ability to be modern, involving the reform of traditional systems of law and governance and formation of a modern army (Goldstein 1989:89-145). The alternative to independence was acceptance of the Republic of China's claim of sovereignty, a choice which would likewise have led to the dismantling of the Tibetan institutions of combined religious and secular rule. Ultimately, between 1913 and 1951, Tibet chose to assert independence under British protection, which secured it some measure of international recognition, if provoking the ire of China. However, as noted by the historian Alex McKay, 'There was no dispute between the two powers [Britain and China] over the ideological model which Lhasa should follow, for China was herself modernising on the Western model. The point of dispute was who would control the process' (McKay 1997:15). The familiar story of Tibet's failure to gain *de jure* sovereign independence is that it was the inevitable result of its incapacity and reluctance to be modern. This fails to capture, however, how the criteria of sovereignty

remained predicated upon nineteenth century concepts of the standard of civilisation. The argument to be explored in this chapter is that the shift from colonialism towards modern institutional international law involved a transformation from explicit legal inequality to an institutionalised inequality, masked by a shift towards principles of humanitarian development and self-determination. Key to this development was the circulation of a discourse of modernity which intersected with issues of internal state control in Republican China. The interaction of both of these forces came to have a significant impact upon the status of Tibet. What follows illustrates how the contradictions inherent in nineteenth century positivist attempts to separate law and politics, as evident in the standard of civilisation, found continuity in modernist attempts to eliminate the irrational and unscientific from secular law and governance.

The era of the *de facto* Tibetan state (1913-1951) straddles this change. Hence, in its early years, 'Modern' Tibet was listed by Oppenheim as one of the 'half-sovereign' states, a classification that greatly resembled Lorrimer's category of 'semi-civilised'. As such, Oppenheim considered Tibet a member of the Family of Nations for some purposes. For Oppenheim, Tibet was equal in this regard to China, Korea, Persia and Siam, which were also classified as 'half-sovereign' (Oppenheim 1920:191). By the Chinese Communist takeover of Tibet in 1951, however, Tibet had become something of an anachronism along with international notions of the 'semi-civilised' and 'half-sovereign.' In a world in which the formal sovereign equality of all nation-states had become institutionalised, there was little room for an entity awkward enough to still be defined by such an archaic concept as suzerainty. Nevertheless, this is how Tibet's status remained defined, for despite periodic assertions by the British that Tibet was independent, and despite Tibetan declarations of independence, the concept of China's suzerainty remained enshrined in the Simla Convention of 1914. Beyond that, the concept of suzerainty tallied with the league's endeavour to extend the 'sacred trust of civilisation' to territories 'which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world' (Article 22.1). The assumption that weak states would, through tutelage, be capable of building the machinery of the modern state and become full subjects of international law was reflected in Sun Yat-sen's nationalist doctrine, in which the Chinese people were to be brought to national democracy through a period of political tutelage.

This chapter contends that rather than being tangential to and superseded by the era of institutional international law, the ‘standard of civilisation’ remained central and pervasive, achieving continuity in modernist assumptions of rationality and scientific administration, which rather than being universal and neutral are intimately indicated in assertions of state power. In the words of Duara:

‘theories of modernisation –both Chinese and Western – appeal to a means-end gestalt to justify such intervention, but might there not be some validity in the view of those who, in their historical experience, have seen the reverse profile of this gestalt: where the narratives of modernisation seem to justify the ends of state expansion?’ (Duara 1991: 81).

This chapter examines ‘the narratives of modernisation’ inscribed in the Republic of China’s attitude to race and nation in the context of both its claim on Tibet and in the wider context of the development of international legal institutions. The ironic and disconcerting possibility that emerges from this inquiry is that the advent of the self-determining age of modern states bound by humanitarian principles offered much less in the way of recognition to the people of Tibet than the age of explicit inequality in which half-sovereigns and full sovereigns populated the same arena.

## **5.2 Race and Nation in the Republic of China**

Chinese leaders of the twentieth century have expressed profound resentment at China’s humiliation at the hands of Western imperial powers. The nature of this humiliation lay not just in the imposition of unequal treaties, but also in the loss of China’s regional influence. Thus, both Sun Yat-sen and Mao decried China’s loss of traditional tributary states such as Korea, Burma, Bhutan and Nepal (Sun 1924:12, Schram 1969:365). If, as this suggests, the restoration of status was central to the formation of Chinese Nationalism, then it is also clear that the past grandeur of the Chinese Empire was a significant measure of that status. At the same time, on an ideological level, Imperial China represented what had become defunct and contrary to progress. In this context, the republic’s claim of sovereignty, and the territorial limits of that sovereignty, operated in a very different framework. In the new republic, the state’s claim for legitimacy was founded upon its assumed progressiveness and ability to negotiate modernity. This did not necessarily entail a complete negation of



traditional values, but it did involve a break with Manchu policy. In his speeches, Sun Yat-sen often emphasised the superiority of the Chinese ancient, pre-Manchu, philosophical tradition and drew parallels between ancient Chinese political philosophy and modern Western ideas on democracy. It was imperialism, firstly under the Manchu rule, and then through Western encroachment, that had hindered progress. According to Sun, the ancient sages had preached democracy, but the people had not practically implemented it (Sun 1924:57). It followed that, in comparison with the West, 'Chinese political history has been a development from freedom to autocracy, while foreign political history has been one from autocracy to freedom' (Sun 1933:99). On this basis, Sun argued, Chinese civilisation was two thousand years ahead of Western civilisation, although Europe did surpass China in material development (Sun 1924:35).

Thus, the amalgamation of the traditional and modern was largely conceived of as the application of Western technology to Chinese civilisation. Moreover, the inference was that it was specifically the apparatus of state which was to be responsible for implementing modern technology in the task of national reconstruction. This was expressed in terms of economic development, but also through training the people in the mechanisms of democracy. After all, for Sun, 'a constitution is a machine for control of human affairs' (Sun 1933:107). The state was implicitly in charge of raising the consciousness of the people, so that the nation could compete or, in the Social Darwinist overtones of the early republican era, evolve to a superior position amongst contending nations (Greiff 1985:451). Certainly, despite the promotion of democratic ideals such as universal suffrage, right of referendum and constitutionally guaranteed individual rights, over the years Sun Yat-sen increasingly emphasised the primacy of the state. Liberty was the enterprise of the state on behalf of the nation, for 'there is only freedom of the nation; there is no individual freedom' (Greiff 1985:448, Sun 1933:299). This authoritarian stance was tangible in Nationalist politics throughout the republican period, before and after Sun's death. It was incipient in Sun's early notions of militaristic government, and given expression in the concept of 'tutelage,' which justified autocracy in the interim period before the people had evolved enough to be trusted with the machinery of democracy. It was finally formalised in the 1946 Constitution of the Republic of China, the product of thirteen years of debate in the KMT, which promised individuals rights on the one hand

(Articles 10-16), but effectively gave the legislature the right to abrogate those rights through ordinary legislation (Article 23). The position of the constitutional drafting committee was made clear by the chairman, who stated:

‘Our great problem today is how to save the nation and the race. Our nation and our race have long fallen under oppressive and exploitative circumstances. Our current conditions are worse than ever before. If we are to save the nation, to save the race, we cannot but ask each individual to sacrifice his freedom with all his strength in order to seek the freedom of the group.’ (Greiff 1985:452)

The corollary of this was that the state claimed to be coterminous with the nation. The paradox here is that the concept of ‘nation’ was essentially irrelevant to the political organisation of China before the end of the nineteenth century. This is an assessment backed up by a large body of literature, and suggested by the imperial nature of the Manchu regime (Dikotter 1996, Zhao 2000). For the Manchus, as non-indigenous rulers, it would have been problematic to have supported a nationalistic notion of China when the indigenous population was Han Chinese and subordinated to Manchu culture. Thus, the basis on which the ‘nation’ was to be understood in early twentieth century China was by no means a decided issue, although critical for the parties seeking political control. The concept of the ‘nation’ was the grounds on which the new, modern state of China could assert identity. Beyond that, it was also a means by which the ruling parties could assert their right to govern by articulating a linkage between the territorial entity defined as China, the population within that entity, and the government’s ability to negotiate on behalf of both with the forces of global modernity without. From the outset, these political requirements created difficulty in regard to the assimilation of the different races that had been co-opted in the Qing Empire. The construction of a national identity that could stand in contradistinction to the imperatives of imperialism, in both its Manchu and Western forms, whilst maintaining the territorial integrity of the Qing Empire, required the resolution of various conflicting demands, particularly in relation to any construction of the nation on racial grounds. A racial basis for nationalism was, however, inferred by the Social Darwinist styled theories that were in circulation amongst the intelligentsia.

By 1946, the idea that the nation was primarily the expression and possession of the Chinese race formed part of the curriculum of primary and secondary education. A 1920's primary school textbook, for example, instructed 'Mankind is divided into five races. The yellow and white races are relatively strong and intelligent. Because the other races are feeble and stupid, they are being exterminated by the white race. Only the yellow race competes with the white race. This is so-called evolution...China is the yellow race' (Dikotter 2001:408). Social Darwinism, a system of thought linked in late nineteenth century China to narratives of race, influenced Chinese intellectuals in various, but significant ways, its derivative becoming a key rallying point of nationalist movements in the early twentieth century. Dikotter, for example, has outlined the meaning given to the word *minzu*, generally translated as 'nationality,' in the period of 1902 to 1911. During this period it was specifically employed in the advancement of a racial basis for the nation as a political unit. Sun Yat-sen specifically promoted this usage of the word in his Three Principles, stating 'The greatest force is common blood. The Chinese belong to the yellow race because they come from the blood stock of the yellow race. The blood of ancestors is transmitted by heredity down through the race making blood kinship a powerful force' (Dikotter 2001:406). It was on this basis that Sun Yat-sen's Three Principles of 'nationalism', 'democracy' and 'people's livelihood' were to be established. This set up an immediate conflict in regard to the republic's relationship with Tibet. On the one hand, the republic sought to claim sovereignty over Tibet; on the other, in establishing a racial basis for the nation, China was affirming the broad concept of nationalism, which was that distinctive cultures were entitled to claim self-determination.

The dilemma this created is reflected in the fact that the definition of the yellow race was somewhat confused. This highlights the difficulty the state faced in projecting a coherent national identity founded on a racial basis. It also reflects the state's inability to reconcile the concept of a Chinese nation with a republic territorially derived from the Qing Empire. The origins of a yellow race were traced back to the earliest ancestor, the yellow emperor, the initial use of the term implying it applied specifically to the Han Chinese. At the same time, the KMT and the Yuan Government claimed jurisdiction over Tibet, Mongolia, Manchuria and Sikang. Accordingly, Sun Yat-sen and Yuan both promoted the notion of a republic formed through the unification of the 'five races' or 'five nationalities.' This principle was

represented by the coloured stripes of the Five-Coloured Flag of the republic: the Han (red), the Manchus (yellow), the Mongols (blue), the Hui (white), and the Tibetan people (black). Whilst this union was claimed to be based upon equality between the races, in the literature of the time the position of the non-Han ethnicities in relation to the overall concept of the yellow race remains ambiguous and contradictory. In his 1919 lectures on the Three Principles, Sun Yat-sen advocated assimilation of all five nationalities, reflecting an earlier nationalist manifesto's position on racial evolution (Sun 1994:224-5). In 1923, Sun Yat-sen entered into an agreement with the Soviet Union which saw the principle of self-determination come to the fore. The principle of self-determination was also an issue of domestic import in relation to increasing civilian interest in the unequal treaties. Accordingly, Sun Yat-sen included the principle in his twenty-five-point Fundamentals of National Reconstruction for the National Government of China. Encompassing both the idea of the state's paternal, civilising role and its defence of self-determination, Article 4 states 'The government should help and guide the racial minorities in the country towards self-determination and self-government' (Sun 1953:10). By the end of the nationalist era, this position had been modified once again. The KMT denied the existences of separate nationalities in the Republic of China altogether, reclassifying them as branches of the Han. Thus, Chiang Kai-shek replaced the five colour flag and declared that Tibet, Mongolia and Sikang part of the Chinese nation. The difference between these peoples, he stated, 'is not due to difference in race or blood, but to religion and geographical environment' (Pahn 1996:88).

The fluctuations in the Republic of China's position on race and nation reflect the political considerations it faced in consolidating its territory. The transition from a difference on the basis of blood, to a difference on the basis of religion and environment significantly alters the nature of the claims made for sovereignty. It is pertinent to recall here the Nationalist assertion that 'a religious society is opposed to a new society based upon the Three People's Principles' (Duara 1991:78). Outwardly, the Republic of China's position was consistent throughout, despite internal regime changes, in that it emphatically claimed sovereignty over Tibet from the outset. However, the shift away from the concept of distinct racial nationalities strengthened the basis of that claim and also helped consolidate the principle of the state's civilising role. When Chiang Kai-shek took control, the KMT formally considered the era of

military instruction to have ended and the period of political tutelage to have begun, in accordance with Sun's three stages of bringing the people to constitutional democracy. This was made explicit by the Provisional Constitution of the Republic of China for the Period of Political Tutelage, promulgated on June 1<sup>st</sup>, 1931. The eradication of distinctions based upon separate nationalities conformed to this idea of ideological assimilation. It also undermined the troubling notion of distinct geographical boundaries between the nationalities, an issue of relevance to the government in light of the failure of the Simla Convention (1914) to settle disputed boundary lines between Tibet and China. The initial concept of a voluntary union of the adjacent tributary nations of Tibet and Mongolia with the new Chinese Republic therefore became replaced with an unequivocal claim of sovereignty, reinforced by a revised myth of racial unity.

The position on assimilation established in the Nationalist party found its parallel in the Chinese Communist Party, and in many respects this position has achieved continuity in the present day. Whilst minorities are afforded protection under the Constitution of the People's Republic of China (1982) and the Law on Regional National Autonomy (1984, amended 2001), the tension between establishing a universal ideological foundation of the state and allowing the expression of difference has never been adequately resolved. This is particularly so when the religious foundations of Tibet became placed in direct contradistinction with the necessary institutions of modernity, subverting the modern state's claim to be the harbinger of progress. In this context, a challenge to the ethos of modern state development becomes inseparable from a challenge to the state per se and is thus a destabilising force.

The fundamental commitment to modernity in the era of the republic is evidenced not only in the ideology of the Nationalists, but also the Chinese Communists. Both the Nationalist Party and the Communists assumed in their vision of assimilation that the lesser or weaker nationalities in their territory would be brought up to the standard of the Han Nation, the advantages of modernity being presumed too great to countenance resistance. It is noteworthy that in the wider context, the ethos of this vision conforms to that expressed in subsection one of Article 22 of the League Mandate regarding the development of peoples' capacity to become

modern. This concept achieved widespread application within China throughout the republican era, and the notion that Tibet would participate in a unified sovereign China was implicated in this. When Mao formulated his revolutionary vision of the Chinese Communist state in 1936 he declared ‘When the people’s revolution has been victorious in China, the Outer Mongolian republic will automatically become part of the Chinese federation, at its own will. The Mohammedan and Tibetan peoples, likewise, will form autonomous republics attached to the China federation’ (Schram 1963:415). As with the Nationalists, this was framed in terms of anti-colonial liberation. Whilst for Mao this was a specific endorsement of Marxist-Leninist theories on class hierarchies between nations, the dynamic remained similar. Thus for Mao, in the republican era, Tibet and Mongolia were understood to be oppressed nations and promised self-determination as a way of achieving equality. However, as noted by Bulag in his historical study of class and ethnicity in Communist Chinese Mongolia, ‘Leninist morality is such that liberation from oppression is justified; but once the Communists positioned themselves as liberators, to separate from them would be morally unacceptable’ (Bulag 2000:537). The position of the Nationalist party regarding assimilation should not, therefore, be seen as unique. Rather, it needs to be viewed as a component of a global vision of modernity that, despite internal differences along the left and right wing of the political spectrum, remained a coherent expression of modernist values.

In terms of traditional tributary relations, the republic’s translation of China’s actual traditional role was uncompromising. The Manchus’ claim of a universal empire asserted cultural superiority, but it did not deny the existence of separate jurisdictions within its zone of influence. The historical evidence also shows that Qing statements of universal empire were frequently linked to its regulation of heterodoxy within the domestic populace. Certainly in relation to Qing-Tibetan relations, Confucian orthodoxy gave way to a distinctly Buddhist styled diplomacy. Thus, actual relations between the Qing emperors and Lhasa, as discussed in Chapter Three, conformed to the Cho-yon concept of equality and reciprocity. The Republic of China’s declaration of sovereignty was similarly linked to its assertion of cultural superiority, particularly in relation to the state’s claim to meet modern standards of civilisation. Likewise, the stated official position was considerably stronger than the reality. In this sense, a parallel with the Qing can be drawn. It is also true that, like the Qing, the Government

of the Republic of China desired to project an impression of control over the border regions to increase domestic security. The discrepancy between the government's stated position of control, and its complete lack of substantive sovereignty in Tibet, is indicative of the rhetorical value it placed upon these claims. However, despite this emerging sense of continuity, the Republic of China differed from the Qing in that it more purposively engaged with international 'standards of civilisation.' There was an orchestrated endeavour to meet those standards so as to gain rank in international society. It is this engagement with the emerging system of modern international law and governance that shifted the grounds of China's claims on Tibet.

### **5.3      Becoming Civilised: The Republic of China's Assertion of Sovereignty**

In the era of the Republic of China, the substantive basis of such a claim was weak, if not non-existent. Tibet's *de facto* status maintained general widespread acceptance, as affirmed by the International Commission of Jurists in 1959, who concluded that from 1913 to 1950 Tibet demonstrated the conditions of statehood as generally accepted under international law (International Commission of Jurists 1959). This is further confirmed by the reaction of the Government of the Republic of China in 1942 to Tibet's establishment of a 'Foreign Office Bureau,' China viewing this as a 'sinister attempt' to transfer their *de facto* status to *de jure* independence (Lin 2002:502). The question arises as to how the Chinese claim for sovereignty gained the sense of validity and continuity that it did over the course of the twentieth century.

The military occupation by the People's Republic of China in 1951 forms the foundation of a substantive claim on the basis of actual control, but evidence so far surveyed in this thesis indicates this to be the first instance of direct rule by China over Tibet. The substantive aspect of territorial state control therefore seems inadequate as a basis for examining the foundations of China's claim. The paradox is that over the course of the twentieth century, the issue of Tibet's status became increasingly circulated through the language of positive law by both sides, each calling on substantive grounds for the claims and counter claims being made. Hence, during the Simla Conference, Tibet insisted that boundary settlement between the Republic of China and Tibet be settled with reference to an eighth century treaty, which not only established a boundary line, but contained provisions regarding any breach of the

obligations which reflected modern international law regarding reciprocal non-compliance (Orakhelashvili 2006:330). Yet, the framework within which such legal grounds are to be found, if at all, is the framework of the normative values of so-called international society. The shift that took place in the Republic of China in accord with these emerging values carried immense weight in regard to all subsequent claims on Tibet, not least because the normative values in question operate pervasively within the international system as a whole. The second irony here is that the renowned clash between Western and East Asian values in the field of international law and relations operates along a much narrower divide than might be presumed. In relation to this, the ‘standard of civilisation,’ and China’s engagement with this standard, remains key.

With regard to the Republic of China’s efforts to attain the standard of civilisation, the blurring of the racial lines between the adjacent tributary nations of Tibet and Mongolia is significant in that it coincides with a much more absolute claim of cultural superiority over these areas. As part of a project to negotiate and assimilate modernity, the Republic of China’s claim to legitimacy was buttressed by its related claim of capacity to civilise the backward peoples. In essence, the hierarchical distinctions between the Han Chinese and Tibetans, Mongolians and Hui were not removed by new definitions of race so much as deferred. Making these nationalities lesser branches of the same overall race expanded the possibility, and therefore legitimacy, of a state sponsored civilising mission. The backwards peoples were not equal, but they did possess equal potential. This claim of civilisational superiority, both an endorsement of the government’s ability to be modern and a statement of its esteemed heritage, had domestic and international ramifications and the nature of the Chinese state’s claim on Tibet was influenced by both these concerns. However, it is not simply the changing face of China’s diplomacy that is of issue (Gong 1984:3). The emerging ‘standard of civilisation’ in this era was central to the development of contemporary social, legal and institutional structures that govern international society. The Republic of China’s specific claims to modernity that took form during this period engaged with these standards and helped shape them. By placing the issue of Tibet in this context, Tibet’s position was increasingly undermined. Whilst China consolidated its own claim to modern statehood, Tibetan state identity was hampered by constant reference to traditional ties with China in which Tibet was identified as a ‘vassal,’ and



its politics and law subsumed by references to its religious institutions. At the same time, the nature of Tibet's traditional foreign relations remained the basis of its claim to statehood.

By the 1920's China's sovereign rights had become an issue of popular interest, particularly after the May Fourth Movement of 1919 which saw mass protests against the Northern government's failure to effect an abrogation of the unequal treaty system and secure China's interest in the Treaty of Versailles. The May Fourth Movement originated in the universities and can be interpreted as part of wider intellectual debate about what it meant to be 'Chinese' amongst the elite. Nonetheless, a dynamic popular basis for revolutionary mobilisation existed alongside, and it drew on knowledge of the Western world, and China's position in relation to it. Between 1916 and 1922, the number of industrial workers doubled, rising from almost a million to nearly two million. During the First World War, nearly two hundred thousand such workers were sent to Europe, an event that aided the development of a popular nationalism based upon Western styled political systems (Schurmann and Schell 1968b:94). In 1919, the factories went on strike in sympathy with the students of May Fourth. Labour organisations and unions became a significant social force, and an interest in 'nationalist' politics gained popular momentum. International affairs achieved wider circulation through the development of a vibrant popular press, a development spurred on by the Literary Revolution sponsored by the magazine *New Youth* (Li 1964:437).

For the revolutionists, who required mass mobilisation to challenge the foreign backed Yuan government, the requirements of political success perpetuated a specific vision of modernity. Their campaign positioned China within a framework of international progress; a sovereign state of evolving technical capability and a political entity to be taken seriously. The circulation of modern ideas in wider society did not simply provide the grounds for party policy; it offered the means to promote a vision by which the contesting revolutionary government could project authority.

#### 5.4 Scientific Administration, Modernity and Chinese Nationalism

Throughout this era, Tibet is generally considered to have been a *de facto* state between 1913 and 1951, a status derived from its closer ties to Britain and recognised in various diplomatic correspondence across the Commonwealth (Van Walt Van Praag 1987:79). However, the definition of Tibet's previous relations with the Qing dynasty remained confused, and the British coinage of the term *suzerainty* as a description of China's role, this being reaffirmed in the 1914 Simla Convention, was particularly problematic. Whilst the term did not satisfy either China's claim of sovereignty, or Tibetan claims of independence, what it did do is compromise accurate representation of traditional Sino-Tibetan relations. In the context of the rise of modern Chinese nationalism, this gains significance in that it obliterated the reciprocity of the traditional *cho-yon* ties and in so doing removed all connotations of China's religious responsibilities to Tibet. The demise of the *cho-yon* relationship is key to an understanding of Tibet's failure to secure long term independence in the face of Chinese claims.

The Tibetan objection to the overtures of the new Chinese Republic was framed specifically in the context of what this meant for the religious security of Tibet. As explored in Chapter Two, the Tibetan institutions of law and governance were founded upon the concept of the twin pillars of politics and religion: *cho-sid-nyi*. This dual system combined undertakings for the spiritual world with undertakings for the material world. The theoretical reciprocity between these two factors is essential to an understanding of the significance of this system in the context of Tibetan culture. The separation of politics from religion is immensely problematic in the context of *cho-sid-nyi*. Firstly, despite the Mahayana Buddhist premise that the material world is empty of true autonomous existence, it is important to emphasise here that this does not imply that material endeavours are without import. Nonetheless, 'undertakings for the spiritual world' are paramount, for they provide the framework for creating correct motivation. Without this, material endeavours will fundamentally fail to prevent suffering and only serve to prolong it. In this sense, it is reasonable to consider that *cho* serves the critical function of providing a check and balance on the articulation of *sid*. Likewise, *sid* offers the means for creating material conditions consonant to spiritual

undertaking. Thus, to separate one from the other would be an irrational act which limits progress.

Such a position is fundamentally at odds with modernist theories of rationality, in which a faith in secularism prompts the separation of law and politics from religion in the model of good governance. Yet, the very act of conceptualising a category that is ‘politics’ in contradistinction to a category that is ‘religion’ assumes that the boundaries between these categories are both rationally discernible and enforceable. The dichotomy between the spiritual and the temporal in Western modernity is irreconcilable with the Tibetan concept of *cho-sid-nyi*. As observed by Nicholas, in the encounter between modern models of secular law and politics and alternative models, culture is ‘invoked mainly to explain away aberrations from the expected patterns of political development rather than treated as fundamental to an understanding of what politics is conceived to be by the citizens of the new nations’ (Nicholas 1973:67). This is an observation supported by a vast body of literature that sets out to examine Tibetan culture as opposed to the relative paucity of analysis of Tibetan law and domestic political institutions.

The development of modern Chinese nationalism set the grounds for a definitive claim for Chinese sovereignty over Tibet for the first time. The requirements of modernity played a key role in this. In other words, the issue of territorial control was more than a defence of substantive economical, material interests within defined borders, even though those interests did exist to some degree. The argument here is that an analysis of Chinese claims of sovereignty on the basis of either pre-existing substantive territorial control or as a result of changing economic and military state needs is inadequate for explaining the force with which Chinese claims were asserted. The circularity of modernity, as a value system, created an imperative for this claim on an ideological basis. This imperative was born of the impossibility of resolving the contradictions inherent in the establishment of a modern, progressive state claiming to legitimately represent the people. Certainly, the republican claim to sovereignty over Tibet served the purpose of challenging any expansion of British, Russian and Japanese influence in border regions that had no significant means of independent defence. This was of justifiable concern given the fragility of domestic order in the

post revolution aftermath.<sup>44</sup> However, the Republican Government's claim to sovereignty over Tibet created significant diplomatic tensions between Britain and China, at a time when arguably the resolution of the unequal treaties was a more immediate issue, with Britain going so far as refusing the republic international recognition unless it relinquished its claim of sovereignty and agree to the definition put forward in Simla Convention (1914) that Tibet was under the suzerainty of China and protection of Britain (Wang and Nyima 2001:119). The new Republican Government maintained no military control in Tibet, and on a diplomatic level Tibet had formally renounced all ties with China after the fall of the Manchu dynasty. China itself was still unsettled. The contradictions were, on the face of it, significant.

The conflict between Tibet and the Republic of China originated in events at the end of the Manchu dynasty. The implications of a British presence in Tibet, post 1904, combined with Japanese and Russian competition in Mongolia and Manchuria, led the Qing government to take decisive military action. Thus, beginning in 1908, Chao Erh-feng, the ambitious Qing Governor-General of Sichuan, instigated a forward push in the Tibetan province of Kham, seizing control and instigating a series of reforms. These included the settlement of nomads, the required adoption of Chinese surnames by Tibetans, and the imposition of the Manchu shaved forehead and queue. The imposition of the queue is significant in that it was a legally enforced requirement within provinces of China. Garnering the support of the imperial court, Chao proceeded to march to Lhasa in 1910 with instruction to take over the post of Lhasa Amban. The resulting conflict culminated in the 13<sup>th</sup> Dalai Lama retreating to British territory in Darjeeling and the imperial court issuing a proclamation deposing the Dalai Lama and directing that a new incarnation be found.

After the fall of the Qing dynasty, any remaining Manchu troops which had not disbanded and signed an agreement to accept the jurisdiction of Lhasa, were replaced with Han Chinese troops. In 1912, the Manchu Amban in Lhasa was recalled by the new republican government, and criticised for precipitating a crisis in Tibet.<sup>45</sup>

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44 Lin.2002:496-497. Records show that the Republican government were genuinely concerned about the possibility that Burma and Tibet would fall to Japanese hands. However, despite the alarmist overtones of these sentiments, they did not exist continuously throughout the era. In this case, for example, the fears were connected to events in 1942.

45 Indeed, apart from the embarrassment caused by the Dalai Lama's flight to British India, Chao's forward policy had destabilised Sichuan, bringing it close to bankruptcy. Smith 1998:174.

However, President Yuan was not intent on withdrawing the remaining troops, and a garrison remained under General Zhong Yin, who was assumed by Yuan to retain the rights afforded to the Imperial Chinese Resident in Lhasa. However, by August 1912, Yuan was forced to accept terms of surrender and the expulsion of remaining Manchu and Han troops in Tibet, this being formalised in the 'Three Point Agreement' mediated by the Government of Nepal. Despite this, Yuan issued orders to General Zhong to delay departure, and it was not until the Tibetan Government employed further force that a new truce and terms of surrender was reached in December 1912. After the final retreat of all foreign troops, the 13<sup>th</sup> Dalai Lama issued a proclamation reaffirming his position as spiritual and temporal leader of Tibet.

Chinese Nationalism as a political ideology was committed to modern secular mechanisms of law and governance, and as such the Tibetan legislature was explicit in its rejection of the republic's model. This was a position consistently asserted by Tibet. For example, the 13<sup>th</sup> Dalai Lama's declaration of independence in 1913 announced that China had abrogated the cho-yon alliance. Key to this was that China had sought a subordination of the 'priest' to the 'patron,' thus subverting the equality and reciprocity inherent in the relationship. The fact that the cho-yon operated as an international expression of *cho-sid-nyi* underscores the supreme importance of such an act (Van Walt Van Praag 1987:316, Smith 1998:182). This position was reaffirmed in 1934, when a Chinese mission was admitted to Tibet following the death of the Dalai Lama. Here, attempts to negotiate a resettlement of the Simla Treaty (1914) failed in light of continued efforts by the Chinese delegate to effect Tibet's participation in the 'Republic of five races.' The Tibetan legislature was explicit in its refusal, issuing a statement that 'Tibet could not co-operate completely with other countries, and could not join the Republic of five races, which was contradictory to Tibetan dual religious-political system.'<sup>46</sup> Given the republic's commitment to secular reform, the irreconcilability of the parties at this conference is unsurprising.

In the words of Perdue, 'Nation states have to be built from the bottom up, on pseudo-democratic principles of popular will, not from the top down, on pseudo-sacral religious claims to divine mandates' (Perdue.2001:286). Inasmuch as the supremacy of

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46 Song (1995:907), using official government records of the Republic of China.

secular law was an anathema to the Tibetan system, so too in the Chinese republic, was the notion that the president should offer spiritual submission to the leader of Tibet. As detailed by Duara, the rise to dominance of scientism as the definitive philosophy amongst Chinese intellectuals in the early twentieth century is a well charted phenomena, referred to as the Chinese Enlightenment. The pre-eminence of positive scientism in fields of social and physical sciences had such power that even the most conservative wing of Chinese Nationalist thought became intent upon justifying its ideology in terms of its scientificity (Duara 1991:73).

Against this backdrop, there was considerable hostility towards religious activity. Between 1900 and 1930, various campaigns against rural religion were launched. These Nationalist Party campaigns marked a departure from the traditional Confucian suppression of ideological heterodoxy in that it involved a more absolute distinction between the scientific and the primitive. Accordingly, various laws were disseminated to bring about the rational advancement of the masses. The 1928 'Standards for Preserving and Abandoning Gods and Shrines' insisted that religious authority was obsolete and that a superstitious nation would become 'the laughing stock of the scientific world' (Duara 1991:108). This was further reinforced by a range of laws promulgated between 1928 and 1930, such as the 'Procedure for the Abolition of Occupations of Divination, Astrology, Physiognomy and Palmistry, Sorcery and Geomancy' (1928), and 'Prohibition of Divinatory Medicines' (1929), 'Procedures for Banning and Managing Superstitious Objects and Professions' (1930).

The Nationalist anti-religion drives were not anti-Buddhist, and the implication here is not that, by extension, they became explicitly anti-Tibetan. For example, within China, organised Buddhism participated in associational politics, gaining influence in national politics over the course of the 1920's. Indeed, the National Buddhist Association petitioned the provincial government of Jiangsu, a province significantly engaged in the anti-religion drives, to halt the reforms, and this carried enough weight to secure a policy change at that level (Duara 1991:78). However, this policy was not enforced at the local level, indicative it seems of the manner in which the discourse of modernity was employed in the redistribution of power at the village level.

This is explainable by the critical requirement of the republic, first under Yuan, and also after the Nationalists gained power, to develop mechanisms of revenue extraction in order to finance their reforms. Popular religion, comprising local associations connected to rural temples, was a convenient avenue of revenue, dovetailing neatly with party propaganda regarding national development. One example of this is in the appropriation of rural temples, which were transformed into elementary schools and offices for local government. Significantly, this enabled the state to attain property and other resources, yet failed to benefit peasants who could not afford to spare children from daily work.<sup>47</sup> In the face of these incentives, popular resistance failed to weaken the party's commitment to modernity, despite widespread anti-party campaigns 'led by priests, monks, and the ubiquitous *liesben* or 'evil gentry'' (Duara 1991:78). Such attempts at resistance were put down as the insignificant work of 'a handful of ignorant and reactionary traditionalists' (Duara 1991:79).

As underlined in this reaction to local resistance, the Nationalist crack down on religion sought legitimacy from an articulation of the theoretical modernist dichotomy between the rational, secular and scientific on the one hand and the irrational, religious and superstitious on the other. The manifestation of this dichotomy in law and policy in the nationalist era failed to achieve objective consistency, a fact ironically subversive to the notion that positive scientism could render not only the material world fully comprehensible, but also enable society to function according to the dictates of rational science. However, the entrenchment of this ideological distinction in actual power relations laid the foundations for later ideological developments, whereby Maoism denounced all religion as not merely 'opium of the people,' but as 'poison' (Miller 1990:223).

Yuan Shikai revised the traditional pantheon of state-sponsored gods with 'a careful selection of apotheosised heroes who could embody loyalty to the national cause.' Chiang Kai-shek endeavoured to strengthen national Chinese identity through

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47 Duara.1991:75-76. It is instructive to compare this process with Mao's account of the Nationalist anti-religion drives, which was also his first recorded reference to the question of religion, in his report 'An Investigation into the Peasant Movement in Hunan' (March 1927). Utilising the destruction of rural temples in accordance with his own ideological needs, he enthusiastically praised the anti-religious activities, obscuring the intrusive role of the state in the process. 'Everywhere religious authority totters as the peasant movement develops. In many places the peasant association have taken over the temples of the gods as their offices. Everywhere they advocate the appropriation of temple property in order to start peasant schools' (Welch 1972:2).

the restoration of Confucian moral values in his New Life movement, and both Sun Yat-sen and Chiang Kai-shek were committed Christians. Nonetheless, Sun and Chiang actively supported antireligious movements, and by the time the Nationalist party took control of a unified China and initiated the era of 'political tutelage', Sun's founding 'Three Principles' were interpreted through the dictum that the masses were to be 'shown the path to rational progress...that religious authority is an obstacle to the development of a people and social progress...and that a religious society is opposed to a new society based on the Three People's Principles' (Duara 1991:78). This presents starkly how the concept of a 'Republic of the Five Races' which encompassed self-determining nationalities of Buddhist Mongolia, Buddhist Tibet and Muslim Uighar, remained fundamentally incommensurable with the modernist ideology around which the Nationalists had constructed their vision of constitutional unity.

Sun Yatsen's 1924 speech on Pan-Asianism reiterated a distinctly familiar argument for Chinese cultural superiority:-

'The differential attitude of Nepal toward Great Britain and toward China is due to the difference between the Oriental and Occidental civilization. China has degenerated during the last several hundred years, yet Nepal still respects her as a superior State. Great Britain, on the other hand, is a powerful country, but Nepal has been influenced by Chinese civilization, which, in her eyes, is the true civilization, while that of Britain is nothing but the rule of Might' (Sun 1941:147).

This coincided with Sun's development of the theme of China's 'sub-colonial' status, in which he argued that China was significantly poorer in circumstance compared to colonies such as India or Korea because it was oppressed by multiple powers, none of which bore responsibility to the Chinese people (Li 1964:800). As part of this theme, Sun explicitly attempted to separate modern Western imperialism from traditional Chinese imperialism, arguing by virtue of Chinese cultural superiority, 'that imperial China, even at the pinnacle of its power, had never impaired the independence of Korea, Burma, Annam, and Siam, all of which had been part of the Chinese empire' (Li 1964:800). Similarly, Chiang Kai-shek asserted that China had never seized territory (Sautman 1997:82).



This idealistic vision of China's historic civilising influence is significant in that it depends upon an assertion of cultural superiority consonant to that found in Western accounts of colonialism's civilising mission. It also embodies the same contradictions in the face of reality. Take, for example, the argument employed by the Chinese delegate at the 9<sup>th</sup> Institute Pacific Relations Conference in 1945, regarding the creation of a system of international trusteeship. The Chinese representative, Shuhsi Hsu, opposed such a system on the grounds that it would endanger the Chinese colonial system. In a memorandum submitted to his foreign ministry on 23 November 1944, he argued that 'if the colonies of the Axis powers were placed under trusteeship, it would not be long until all colonies were subject to the same status.' Shuhsi went on to explain that 'some may think that we [China] do not have colonies to bother with.' Those people 'merely deceive themselves. The Mongols and the Tibetans in the Chinese Republic do not participate in the government like the Chinese. Nor do Mongolia and Tibet enjoy 'sovereign equality' with China.' He reasoned that 'under the circumstances what other than colonies could we regard the two borderland communities?' Thus, trusteeship would compromise China's traditional interests in Tibet and Mongolia and threaten its potential interests in areas of the South Sea intended for trusteeship status' (Wiggins 2000:68).

This is a remarkable statement, given that the republic had neither legislative nor military authority in Tibet at the time, a fact of which Hsu was not only aware, but must have been equally assured that the other participants at the conference were likewise cognisant. His argument betrays much of the contradictions of Nationalist policy, on the one hand being a statement of China's sovereign status and an assertion of theoretical power, on the other hand making clear the weakness of China's claim. It also highlights something of the attitude with which Nationalist China came to view the peoples of its border lands, the traditional tributary ideology finding continuity in modern conceptions of advanced, backward and dependent peoples.<sup>48</sup> The continuity of inequality, mediated in contemporary domestic Chinese law through the framework of minority rights and regional autonomy, will be explored further in Chapters 7 and 8.

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48 In the contemporary People's Republic of China, many Chinese intellectuals continue to rate the main ethnic groups of the nation in descending order from Han to Tibetan. Furthermore, the enduring effect of tributary ideology can be adduced from more recent events. In 1994, China and South Korea publicised plans to produce Asia's first locally built airliner. By 1996, the project had foundered due to irreconcilable difference between the parties. Commentators attributed this in part the Chinese view of Korean inferiority, 'who they thought about in terms of the former subordination of Korea to China as a tributary state' (Sautman 1997:87).

The point of concern here is to elucidate how the incorporation of modernist values into the mechanisms of actual state power in the Republic of China established a stable position of sovereign equality, converging with international developments regarding power, modernity and development.

The Nationalist state's attempt to define in law the appropriate objects of religious worship in the modern state presumed that such a distinction could be made scientifically and rationally. It reflects, also, the modern ethos of humanitarianism and the onus on development found in international legal institutions from the League's Mandate System onwards. Hence the laws and regulations circulated by the Nationalists also sought to engage with the notion of freedom of religion, this achieving a formal guarantee under Article 6 of the Provisional Constitution of 1912, and Article 13 of the Constitution of 1946. Meanwhile, the campaign to abolish objects of superstition, expressed in the language of rationality, science and progress, presented the distinction between 'religion' and 'superstition' as part of a universal standard that was both ordinary and natural. This classificatory strategy, by demarcating religion from superstition, 'revealed the play of political considerations in its effect to disenchant the world and give it to us as it is' (Duara 1991:109).

The decisive alteration in the distribution of power, and the significant increase in the administrative penetration of the state into village life, as illustrated by the campaigns against popular religion, is a feature of modernisation found at the national and international level. It brought a disparate section of society, not easily assimilated by modern institutions, under legitimate control. It is the linkage of this modernisation process, a process carried out within a framework of power relations (locally, individuals pursuing advancement; internationally, states seeking commercial and diplomatic advantage), with the progress of the Nation State that is critical in the consideration of Tibet's changing position in regard to both international law and China. Whilst change may have been inevitable, it is important to examine exactly what part of the modernisation process concerned technological development, and what part of the progression was the circulation of an organising discourse, which regulated the dissemination of knowledge. It may be considered that the theory preceded the application, inasmuch as science gave birth to the technological progress that marks out the Modern age, and that theoretical considerations are subordinate to

pressing practical considerations regarding the functionality of modern institutions. However, even within the parameters of empirical science, the assumption that scientific theory is capable of producing an ultimate, and final, theory of everything is a moot point, presenting a space in which the commitment to modernity is revealed as faith.

This space also exposes the subjectivity of law, revealing:-

‘the slippage from the epistemic to the ontological’ that ‘allows the law and its artefactual forms, doctrines, principles, policies, and so on, to be treated as objects in their own right. It is this slippage that enables legal thinkers to treat the law as an *authoritative* source that exists independently of the beliefs of the legal (or the wider) community’ (Schlag.1997:440).

It is in this context that the dissolution of explicit nineteenth century sovereign inequality needs to be placed, for whilst it became seen by twentieth century jurists as an embarrassing artefact of autocracy, linked to the failures that created the First World War, the new institutions of international law, in their commitment to modernity, retained the demarcation that rendered alternative ways of being always *less than* and *ever in the process of becoming*.<sup>49</sup> Despite the spirit of self-determination that prevailed after the First World War, the overriding concerns for stability between the great Powers ensured that the inequalities encapsulated in the standard of civilisation still held sway. Whilst the year of the Washington Conference also witnessed Rui Barbosa, the Brazilian Republican, succeed in becoming a judge at the Permanent Court of International Justice, his arguments for strong sovereign equality at the Hague Conference of 1907 had widely been perceived as the obstacle preventing the court’s earlier establishment. The Hague’s shift towards a more inclusive international order, which admitted the South American states, China, Siam and Japan had not translated into legislative quality. Thus, whilst formal sovereign equality had been granted to China at the Hague, the league’s attempt to balance the two principles of collective security and self-determination ensured that legalised hegemony was

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<sup>49</sup> With regard to the post First World shift, Oppenheim, for example, modified his approach after the war, stating ‘the progress of international law is intimately connected with the victory everywhere of constitutional government over autocratic government or democracy over autocracy.’ Kingsley.1998:608.

retained in such mechanisms as the de facto veto power of the Great Powers and special representation for the Allies (Simpson 2004:158).

As argued by Rajagopal, the central structural mechanism of the Mandate system, as it was formulated under the league, was the institutionalisation of the science of ‘finding the facts,’ this being derivative of Article 22’s principle of aiding ‘peoples not yet able to stand by themselves under the strenuous conditions of the modern world’ (Rajagopal 2003:53). This marked a significant shift from the type of specific data collection undertaken in the colonies by the Powers in the process of governance, for it involved a systematic comparative study of conditions which made it the precursor to modern development models, ‘native well-being’ becoming ‘professionalised and institutionalised during the inter-war years’ (Rajagopal.2003:60). In a process which draws parallels with the Republic of China’s appropriation of local resources through the intervention of modern institutions and annexation of local religious associations, this was a process which shifted the ‘moral burden’ of administration to a technocratic, faceless bureaucracy’ (Rajagopal.2003:52).

In Europe, from the late nineteenth century, disillusionment with the ethos of colonialism and the progressive evolution of the civilised had been growing amongst jurists, as expressed in Catellini’s pessimistic evaluation of 1901:-

‘If the international society must in the immediate future live and develop in accordance with the law of the struggle for life and the survival of the fittest, I myself wish that my country will not remain on the side of the weak and the incapable, destined for submission and disappearance’ (Koskenniemi 2002:99).

The league’s mandate system thus consolidated the transformation of colonialism into mechanisms of humanitarian development, reconciling what had become the inescapable disenchantment with positivist law following the Great War, with the interests of the Powers to maintain economic influence in the mandates. In the words of Anghie, ‘the League attempted to render these territories completely transparent and visible to international scrutiny and management’ (Anghie 2006:453).

One of the functions of this intensive project to develop a 'science of administration' involving the collection, interpretation and assessment of facts, was that 'the nation-state that the mandate system was striving to create was understood, not merely as a juridical status, but as a massive complex of standards and regulations, which represented the sociological, economic and political criteria that a territory had to satisfy in order to become a functioning, independent nation-state (Anghie 2006:453-454). Rather than effecting the end of nineteenth century demarcation between the civilised and un-civilised, this became a process in which the Permanent Mandates Commission, in its survey of the internal situation of mandates and its development of a 'new technology of standards,' was able to 'apply the categories of advanced and backward to every aspect of the social life of the mandate territory, this with the purpose of transforming the backward into the advanced' (Anghie.2006:454). In this context, the survival of local communities, as with rural popular religion in Nationalist China, became related to an overarching concern with economic capacity. In a stark parallel with nineteenth century positivist concerns with the legal capacity (or incapacity) of the uncivilised, one of the members of the PMC argued against a policy designed to preserve particular communities within mandate territory on the grounds that the economically unfit were better governed by more progressive societies, the ideal being the 'slow, unforced assimilation of weak or inferior communities by strong or more highly developed communities' (Anghie 2006:454). As observed by Rajagopal, this notion of the well-being and development of the natives as expressed by the mandate system involved the adoption of 'a humanitarian hue that had existed until then only at the periphery. This converted humanitarianism 'from a principle of domination and resistance' in the context of colonial expansion, 'to one of governance' in the era of decolonisation' (Rajagopal 2003:56).

In this regard, what were initially principles of law became transformed into administrative programmes of action, as noted in the *International Status of South West Africa Case* where the International Court of Justice affirmed that the mandate 'was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilisation' (Rajagopal 2003:56). This concept was similarly highlighted from the opposite side in the dissenting opinion of Alvarez in the Advisory Opinion of the ICJ, which stated 'because of these characteristics, the new international law is not of an

exclusively juridical character. It has also political, economic, social and psychological characteristics' (Rajagopal 2003:62). It is these characteristics, expressed in the fact-finding activities of the Mandate Commission and its derivative assessments of standards, that Rajagopal argues are the 'self-generative and self-deterministic aspect of the PMC's work, enabling it to determine its own field of reality,' and that this has come to be, 'a standard aspect of international institutions in general. In part this is due to the fact that these institutions are creatures of law and law in general displays a heuristic tendency whereby it needs to establish its own field of autonomy only by simplifying and excluding much of actual reality' (Rajagopal 2003:65).

At question is the universality and neutrality of law, 'the deeper discursive mechanisms of power that present the contingent and partial as commonsensical and normal' (Duara.1991:81). Here it is not 'mechanisms of power' in the sense of any abstract, external force of power that is masked, but the local, historically based agents of power; individuals. Power is not an autonomous social force any more than 'Rationality', or 'Law,' because it cannot exist beyond the agency of its human actors. The discourse of modernity was required to produce a revisionist history that gave credence to its claims, and this was reinforced, and enforced, by new legal structures which gave formal utterance to its universalistic pretensions. The discourse of modernity was an enabling strategy for a Nationalist party espousing the sovereign equality of China, but it was also a limiting and contradictory one. It produced positions 'which do not merely refuse to recognise their own origins and limits; they are unable to do so (Chatterjee.1998:11).

The replacement of the myth of the universal (Manchu) empire with a myth of nationalist modernity problematises China's relations with its ethnic minorities. It creates a paradoxical dependency, derived from the gap between the state as modern and the nation as ever existing. With the rapid expansion of the state into all areas of civil society, the burden on the state to legitimate its intervention increased. In this, the new legitimating myth of the nation arguably became a much more totalising myth than that of the universal empire. This is partly because the institutional mechanisms involved had achieved greater reach, partly because the discursive mechanisms employed were reinforced by international interests.

Traditional cultures, as representatives of pre-modern modes of being, are at once testament to the nation's progress and the foundations of its legitimate spatial existence. In Republican China, the pursuit of the nation therefore radically altered the centre's relation to its frontiers. The struggle for cultural freedom that the revolution represented was incommensurable with the necessity of projecting a unified national identity within the context of the state. In part, this can be seen as an outgrowth of the inability of totalising terms such as 'nation' and 'state' to capture the complex interaction of individuals and groups struggling for power in the post Manchu era.

In recent years, historians such as Edmund Fung have set out to provide an analytical framework that takes account of the complex interaction and linkages between internal political and external international issues (Fung 1987). This is part of a wider attempt to argue that the previously dominant 'response to the West' methodology, by detracting from the agency of local society, is inadequate for understanding the complex social and political changes in China. However, arguably the 'response to the West' approach to the history of Manchu China was ironically central to the Nationalist project, providing a counterpoint against which to demonstrate China's sovereignty and a basis around which to consolidate national identity. The massive, wholesale importation of Western legal and political systems in this era radically altered the manner in which contradictory beliefs were mediated, as evidenced by the changing emphasis from the Qing drive against heterodoxy and to the Nationalist drive against superstition. By invariably placing China's modern national identity on the international stage, there was also a resulting legal formalisation of China's geo-political relations. This articulation of China's regional relations was much more totalising than ever witnessed under the Manchus.

Part of the difficulty of Nationalism is that it is not limited to the determination of territorial boundaries. It is also engaged in and dependent upon the task of defining a certain 'cognitive boundary of culture' (Chatterjee 1998:13). This leads inevitably to the dilemma that 'if the thought system of a culture is indeed incommensurably different from those of others, we would not even have the background of consensus necessary to recognise the difference' (Chatterjee.1998:13).The debate on cultural relativism is relevant to consideration of both law and nationalism. Nationalism sought to both assert difference and equalise it,

and its principle means of doing this was through the appropriation of the discourses of power that were operational with the wider international context, or if you will, the overarching discourse of modernity.

In a 1905 essay, Sun writes:-

‘I consider the evolution of Europe and America was based on three leading principles, namely nationalism, democracy, and socialism or people’s livelihood. The fall of the Roman Empire gave rise to nationalism and independence in various nations of Europe. When these various nations became monarchies, with despotism and intolerable distress inflicted upon the people under their jurisdictions, the principle of democracy was aroused.....The more the world progressed, the more did human wisdom. When, out of the experience of a thousand years, material inventions were made during the last hundred years, economic problems succeeded the political problems and thus socialism or people’s livelihood emerged; the twentieth century may be considered the era of socialism’ (Li 1964: 204).

In this sweeping summary of the history of the Occident, Sun creates a curious parallel to Western ‘Orientalism,’ idealising the political culture of the West. To recall Dirlik’s argument that orientalist constructions were employed by Chinese (particularly the Chinese diaspora) as part of an assertion of pan-Asian identity, ‘metonymic reductionism has been apparent in the identification of China among liberals and conservatives with Confucianism, despotism, bureaucratism, familism, or even with particular racial characteristics, all of them traceable to oriental representations, or to unchanging ‘feudal’ or Asiatic society in a Marxist version of orientalism. What was common to all was a rewriting of Chinese history with images, concepts, and standards drawn from a contemporary consciousness of which ‘Western’ ideas, including the imaginative geography of orientalism were an integral component. This consciousness was formed now not just by the circulation of Euro-Americans in China as in the case of the Jesuits, but by the circulation of Chinese abroad’ (Dirlik 1996:107). This is, then, an example of what Chatterjee was referring to when to when he identified ‘an inherent contradictoriness in nationalist thinking, because it reasons within a framework of knowledge whose representational structure corresponds to the very structure of power nationalist thought seeks to repudiate’ (Chatterjee.1998:9)



It is a central argument of this thesis that the Chinese Republic's self-conscious move towards modernity was rendered less paradoxical than its Tibetan equivalent. Chatterjee argues that nationalism reverses the dichotomy of orientalism, but fails to remove its contradictions. It is this that renders modern nationalism doubly problematic for Tibet, for if 'Nationalist thought, in agreeing to become 'modern', accepts the claim to universality of this 'modern' framework of knowledge,' the rationality of traditional Tibetan institutions becomes displaced by the appropriation of the definition of the 'rational' in modern thought (Chatterjee 1998:11). For if 'The dominant system of values has been declared value-free; it then follows that all others suffer from bias and can be thoughtlessly dismissed' (Kairys 1982:6). This raises 'the possibility that it is not just military might or industrial strength, but thought itself, which can dominate and subjugate' (Chatterjee.1998:11).

## Chapter Six

### 6:1 Introduction

To recap on the themes of the previous two chapters, the changing position that Tibet occupied in relation to China reflects a dynamic integral to the colonial encounter: the inevitable assimilation of the non-western world into the European legal order. China's incorporation into the family of nations is now a classic example of this process, marking Chinese resistance and affirming the 'universality' of Western legal standards. The history of China's encounter and engagement with international law is central to an understanding of the history of international law generally. It is a history that is both an affirmation and a denial of the evolution of international law and its claim to universality in that, despite political difference and theoretical and doctrinal challenges by Chinese jurists, China took its seat at the Security Council. In so doing, a counter narrative of laws progress is revealed, in which the legacy of the colonial encounter becomes discernible in a continuing debate over universal values and cultural relativity, and within that the memory of the standard of civilisation which marked the contradictory beginnings of twentieth century inclusion and universality. This snapshot of international legal history, be it presented as an affirmation or a denial of modern liberalist progress, is now a significant feature of the discourse of international law. As such, it allows for a new approach to the issue of Tibet's status by widening the frame beyond consideration of the substantive legality of Chinese sovereignty over Tibet towards a consideration of how that sovereignty has been constructed and altered by the intersection of imperialism, modernity and Chinese nationalism in the nineteenth and early twentieth centuries. The previous two chapters of this thesis were concerned in part with a broad response to these issues, and the changing status of Tibet can be seen as an addition to this field of international legal research. This is, however, only one aspect of the history of Tibet in international law.

This chapter considers the space left for independent Tibetan national identity in a rapidly modernising society of postcolonial states. The boundaries of this space are conceptually and legally marked by the two most significant legal instruments concerning Tibet's status in the twentieth century: The Simla Convention (1914) and

The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet (1951), also known as the Seventeen Point Agreement. The Simla Convention, the last treaty between Britain and Tibet, looks backwards to an era of imperial expansion in which legalised hierarchy allowed sovereign equality to be enjoyed by only the most civilised of nations. The Seventeen Point Agreement, meanwhile, looks forwards to a time of legalised equality in which culture became ostensibly protected insofar as it operates behind the scenes of the modern social and economic administration of state-led development. The fact that it was the Seventeen Point Agreement, with its provisions for PRC sponsored development of education, agriculture, livestock raising, industry and commerce in Tibet, that marked the end of Tibet's independent existence, rather than the Simla Convention, raises some uncertainty about what the measure for equality is; for the boundaries drawn around Tibet's status in 1914, despite disavowing equality, did affirm legal personality.

It is not, therefore, adequate to view the incorporation of Tibet into the PRC as a final fruition of seeds of incoherency and inequality sown in the final years of the British Empire. Certainly the evaluation of imperialism is key: it marks the dividing line between the PRC's claim that Western imperialism created the myth of Tibetan independence by undermining Chinese sovereignty, and the Tibetan Government-in-Exile's claim that Tibet was always independent and that Tibet's interaction with the British Empire confirms this fact. Yet, to write Tibet back into a history of the discipline of international law is not an endeavour that begins and ends with a reappraisal of nineteenth century exceptionalism, or with an assessment of the impact of Western imperialism on the non-western world. Certainly these represent aspects integral to an understanding of Tibet's status, but the event that was the colonial-encounter does not explain the ongoing absence of consideration of Tibet's status in international legal discourse. This exclusion may have its roots in the great game of the British Raj, and Britain's commercial interests in China, but whilst imperialism changed Tibet's significance on the map, it was the end of empire that saw its erasure. This erasure is a very twentieth century phenomenon, emerging at the very moment in which colonial became postcolonial. Whilst Curzon's cynical direction of Younghusband's invasion of Lhasa may prompt the 1904 Lhasa Treaty to be viewed as an example of imperialism's endeavour to secure legitimacy in positive law, that Tibet

was a pawn on the ‘imperial chessboard’<sup>50</sup> does not explain why in the last one hundred years only twenty-seven articles have been published in international law journals in which Tibet is the primary subject –with one of these being extracted from this thesis (Kellam 2003).<sup>51</sup>

The PRC’s occupation of Tibet can be, and indeed is in official PRC literature, viewed as a restoration of a balance disrupted by Western imperialism: ‘The myth of ‘Tibetan independence,’ which evolved during the late nineteenth century is actually the product of the imperialist invasion of China, with the British invaders in Tibet as the chief architects’ (Wang and Nyima 1997:80). Yet, even if this were so, the exclusion of Tibet from legal discourse is suggestive of more than a pragmatic acceptance of political circumstance. It indicates a theoretical dynamic at the level of discourse which sustains this absence and creates for itself margins of exclusion. The question is what significance does this have, not simply for the understanding of colonialism and international law, but the construction of the understanding of colonialism and international law *in relation to* the experience of what it is to be postcolonial and postmodern. If indeed Western modernity appears as a sudden self-consciousness regarding the narrativisation of social ethics and a heightened sensitivity to modernity’s perpetual reconstruction of the subject, and the present to which it belongs in order to maintain value in the absence of actual objective status, then possibly the exclusion of Tibet from legal discourse reveals something of the limits of the ‘post’ in postcolonial (Bhaba 1991:197). With this in mind, this chapter is not concerned with locating and giving voice to a subaltern Tibetan national-state identity; the aim is to explore the space left for an evaluation of Tibet’s status within international legal discourse and the mechanism of how subalternity is produced.

As discussed in Chapter three, the Anglo-Tibetan Lhasa Convention of 1904 was the culmination of the great game competition in the Himalayas. The result was increased anxiety about Tibet’s status, its lack of substantive commercial and military power ironically only increasing the perceived threat it represented as a potential tool in the hands of imperial powers. The resolution of the threat from British, Russian and Chinese perspectives involved not simply the prevention of a great power takeover of

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<sup>50</sup> The phrase derives from the title of Premen Addy’s study of Tibet and the British Raj (Addy 1984).

<sup>51</sup> This figure is based upon searches of the HeinOnline databases for articles with ‘Tibet’ or ‘Tibetan’ in the title.

Tibet, but, necessarily, the neutralisation of Tibet's ability to act independently. The British-led definition of Tibet as a vassal of China was a policy designed to achieve this, and had the profitable benefit of not irrevocably upsetting the balance of British commercial interests in China.

A number of studies have examined the formation of these policies and their effects on Tibet, and have emphasised the rather arbitrary way in which great power politics have impacted upon Tibet's legal status. The manner in which Tibet was used as a pawn is key to understanding the 'Tibet question,' and the controversy with which Tibet's claim to independence was met. One of the difficulties in approaching the issue of Tibet's status within this context, however, is that the objectification of Tibet as a pawn reinforces notions of Tibet's passivity. Whilst it is undoubtedly the case that Tibet's status was largely imposed from without, the very discussion of such an encounter that takes as its starting point the subjugating force of imperialism is in danger of replicating the imperial imperative of neutralising Tibetan agency. Indeed, there is a more general argument to be made that the presentation of Orientalism as an all consuming hegemonic discourse fails to consider alternative local discourses, and thus masks subaltern agency. A similar dynamic is evident in the discourse of modern nationalism, as deconstructed by Chatterjee (1998) and Bhaba (1991), for example. One of the factors hindering the representation of Tibetan agency is that it raises contradictions within both imperialist and nationalist discourse. The Tibetan refusal to embrace secular modernity marked Tibetan social theory as incompatible with both imperialist standards of civilisation and the nationalist ideology that arose in resistance to this. This reveals a contradictory space, between colonial and postcolonial, in which Tibetan social theory has struggled to find meaningful representation. Few studies have arisen to explore this gap: as Tsering Shakya has observed:-

'in the field of Tibetan or Buddhist studies, where much of the narrative relating to Tibet is enunciated, questions drawn from critical studies on the postcolonial discourse have never been raised. Tibetan studies still continues along the lines of an orientalist descriptive mode' (Shakya 2001:183).

As argued in Chapter two, implicated in this is the absence of studies on Tibetan social and legal theory.

## 6:2 Tibetan Modernisation

A significant obstacle to the creation of a viable Tibetan national state in the modern world was the fact that Tibet's governing institutions "were not based upon military force as a principle" (Norbu 1985: 176). Amongst Buddhist countries, Tibet was unique in this regard, for the *sangha* were not politically subservient to a sovereign ruler, as was the case in Burma and Thailand, for example. Thus, despite the confrontation between Western secular law and Buddhist law that occurred as a result of colonial encounters elsewhere in Asia, the context of this confrontation was significantly different in Tibet. The framework and institutions for a separate secular society did not exist. The absence of any meaningful standing army was a result of this, being contrary to the Buddhist principle of non-violence. A primary contradiction inherent in maintaining what Dawa Norbu terms a 'non-coercive regime' (Norbu 1985) was that coherent and continuous territorial existence became reliant upon external powers for military support. In Tibet this was fulfilled in the nineteenth and early twentieth centuries by both Nepal and China.

In 1911, the Government of Lhasa expelled all Manchu troops that did not agree to become naturalised and declared independence. In lieu of a suitable foreign guarantor, the British declining to formally declare Tibet a protectorate despite Tibetan requests, the Thirteenth Dalai Lama initiated a series of modernising reforms. These included the establishment of a standing army equipped and trained according to modern methods of warfare, and the establishment of a police force. In his mission to strengthen Tibet, he had implemented significant reforms to the domestic legal system in the years before the British incursion of 1904 and sought to develop Tibet's diplomatic relations.<sup>52</sup>

The advent of the new Tibetan Army and police force was highly controversial in Tibet, splitting the establishment between a modernising faction in favour of reform and a conservative element hostile to institutional change. The

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<sup>52</sup> An instructive analysis of this period can be gained from the work of Goldstein (1989), Dhondup (1986), McKay (1997) and Deki and Rhodes (2003).

modernisers were represented largely by estate holding laymen such as Tsarong Shape and the conservatives by the great monasteries, which saw modernisation as a threat. The conflict was by no means a clear cut struggle over the division of secular and religious power. Multiple factions with various conflicting and intersecting demands debated the appropriate role that modernisation could or should occupy in Tibet. A significant feature uniting the various groups was a commitment to maintaining an independent Tibet. The most controversial figures, such as Tsarong, commander-in-chief of the army, cabinet minister and head of the Tibetan mint and armoury, tended to be those who embraced aspects of British culture such as dress, sweet tea drinking, shaking hands and playing tennis and polo (Goldstein 1989:89). Such figures remained elitist and, whilst represented as exemplary in British records, their overt secularism certainly outraged abbots. However, it was the intersection of modernisation and foreign influence that was critical, made explicit, for example, in Tsarong's policy of dressing the Tibetan Army in British uniform.<sup>53</sup> Ultimately, with limited military means, Tibet's lack of national defence left it vulnerable to attack, created dependence that constrained its international personality and also became a political issue that hindered internal national unity.

With regard to international law, the existence of a standing national army is not a requirement for statehood in the jural sense, this principle being confirmed as customary law in the Montevideo conference. However, the standard of civilisation had established a normative framework which placed emphasis upon the existence of a modern, state sponsored military force, this being linked to both the principle of protection of life and property for foreigners within states, and principles of civilised warfare between states. The lack of capacity for self-defence was a signifier of a state of 'backwardness.' This awarded a certain epistemic privilege to the aggressor comparatively in possession of such a capacity. Westlake expressed this view, citing capacity for self-defence as an objective test of political organisation, and in the 1930's Italy argued for the legitimacy of its actions in Abyssinia on similar grounds (Gong 1984:17). On a more substantive level, the development of international legal rules and obligations has rested significantly upon the existence of military engagement between states. Thus, the existence of the *prima facie* capacity of the Tibetan Government to

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<sup>53</sup> For British perspectives, see Bell's (Political Officer to Sikkim, Bhutan and Tibet 1908-1918 and 1919-1920) autobiographical account of the period (Bell 1992.)

enter into treaties is only one aspect of the issue of Tibet's legal personality. The evidence shows that internally Tibet possessed the requirements of statehood. The significance is that it did little to engage or utilise its institutions externally. Japan's entry into the civilised family of nations was linked to its military victories over Russia and China. Similarly, China's inclusion was marked by its appearance at the Hague Conference in 1907. This leads to the ironical observation that, for Tibet, the state sponsored pursuit of peace excluded it from involvement in the development of international legal instruments concerning peace. Meanwhile the most championed articles and institutions of international law from The Hague through to the U.N. Charter were ostensibly concerned with creating and maintaining peace, the principle of which had been institutionalised by the Tibetan state, following demilitarisation, three hundred years previously.<sup>54</sup> International law's preoccupation with violence can be presented as a valiant endeavour to create and maintain order, but this fails to shake off the implications of Weber's definition of the modern state as the "ultimate monopoly over the legitimate use of force within a given territory" (Weber 1919:73).

This dynamic was one obstacle that Tibet faced in the creation of a strong identity as a nation-state. The Tibetan political scientist Norbu concluded that under the Dalai Lamas "Tibet had ceased to be a state in the Weberian sense" (Norbu 1985:191). A second interrelated obstacle was the decentralised nature of the Tibetan polity, which is for Geoffery Samuel a 'stateless society.' However, the existence of autonomous zones that looked towards Lhasa, but at times acted independently from Lhasa, such as Tashi Lumpo under the Panchen Lama, for example, is not contradictory to either a Lockean or jural definition of statehood. The three regional provinces of Tibet were, after all, administered and legislated according to a codified system of law that spanned a vast territory, delimited by internationally recognised borders.<sup>55</sup>

Aside from Tibetan non-involvement in international institutions governing warfare, there was only negligible international commercial engagement. Salt, tea, wool and

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<sup>54</sup> How successful Tibet was in maintaining this position is, of course, open to debate. See the discussion of the Nepal-Tibet wars in Chapter 2.

<sup>55</sup> See, generally, French.1995. Ethnographic Tibet did, however, extend beyond these borders, something which creates some confusion over the territorial definition of Amdo and Khams. Goldstein provides a useful introduction to the debate this has caused in Goldstein and Epstein (eds.) 1998:4-5.



horses all figured prominently in traditional Tibetan trade relations, the supply of each at times being of great significance to its external affairs. The tea market, for example, was what attracted the East India Company to pursue the association, owing to the fact that the company's research suggested that Tibet had the highest per capita tea consumption in the world, 'Australia not excepted' (Norbu 1990:41). However, by the time Tibet declared independence and began to pursue external links through diplomatic missions, Tibet had already been dismissed as a 'worthless piece of territory' in official British documents as far as trade was concerned (Norbu 1990:43). Beyond that, Tibet did not possess a banking system that may have facilitated a flow of foreign finance comparable to the profitable array of loans made by the powers to China. In this context, it is of little surprise that when the Thirteenth Dalai Lama requested, between 1909 and 1911, that Britain declare Tibet a British protectorate, the offer was refused, a decision made all the more inevitable given that what Tibet lacked, China possessed in abundance, to Britain's profit (Winston 1916).

This lack of economic value is reflected in later U.S. policy when Tibet sought admission to the U.N. as a precursor to gaining support for a military defence against the People's Liberation Army of China in 1949. The U.S. evaluated the case of Tibet's proposal on the basis of Tibet's stable government being a defence against the spread of communism in Asia on the one hand, and its strategic value to the U.S. on the other, in both economic and military terms. The arguments against granting Tibet recognition were deemed to carry the most weight:-

'As a political matter, Tibet's importance both ideologically and strategically is very limited. Because of its geographical remoteness, the primitive character of its Government and society and the limited character of its contacts with the outside world, Tibet's orientation toward the West cannot be counted upon to endure on an ideological basis unless supported by far-reaching practical measures. If we cannot take these practical measures, recognition in itself would not hold Tibet in alignment with the West and might in fact work against our long-run interests. Similarly, efforts to utilize Tibet strategically, for example as an air base or for the discharge of rockets, would encounter not merely formidable difficulties of terrain and weather but also Tibet's objections on religious grounds to the passage of planes over its territory. Unless rare minerals are found in Tibet, the Army does not regard Tibet as of strategical significance' (U.S. Department of State 1949:1066).

This example is in keeping with much of the diplomatic discourse between the Powers concerning Tibet's status. It is significant for its treatment of the Tibetan issue as a matter of expediency, the status of Tibet being evaluated according to its impact upon other actors rather than as an inherent quality. The internal location of identity, and the presence of legal rights and capacity, is of little relevance, a dynamic entirely in keeping with nineteenth century notions of civilisation, in which legal capacity is something extended or bestowed. This is a dynamic that finds expression in the fact that a traditional Tibet, demilitarised and unindustrialised, was of little value in the context of great power relations, and was even a liability. It is noteworthy that in U.S. State Department records, China's role in Tibet was described as both *de facto* sovereignty and *de jure* suzerainty, even within the same documents (U.S. Department of State 1949:1065). The interchangeable use of the terms sovereignty and suzerainty reflects a perception that placed Tibet's status on the periphery.

Dawa Norbu argues that it is necessary to depart 'from the conventional sovereignty-suzerainty dichotomy, because it is essentially a superimposition of Western legal conceptions on a non-western phenomenon' (Norbu 1985:193). There is much truth in this conclusion, but on the other hand in a very real sense the sovereignty-suzerainty dichotomy has always been peripheral to the considerations of Tibet's status. Whilst the terms appear central to Tibetan claims of independence, from the point of view of the parties who were instrumental in circulating the terms, Britain, Russia and U.S., the distinction was of only token importance. The treaties in which the terms arose, either in the final document or in negotiations, all had purposes connected to other, more primary interests such as trade or post-conflict resolution and it is these factors which decided the ultimate status of Tibet as a nation-state.<sup>56</sup> This raises very significant questions regarding Tibet's refusal to modernise. The implication of this refusal is that Tibet lacked a sense of national identity; that its absence in the international arena was in some way connected to an internal absence of national identity inherent to modernity itself.

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<sup>56</sup> Convention Between Great Britain and China Respecting Tibet (1906), Convention between Great Britain and Russia (1907), Agreement Between Great Britain, China and Tibet Amending Trade Regulations in Tibet of 1893 (1908), Simla Convention (1914).

To elaborate further, the demands of international legal identity presuppose commercial and military engagements in the international arena, and in Western political theory these are matters to be dealt with in the secular sphere. To simply claim legal identity without these buttressing political forces essentially removes the grounds on which the law is based, its *raison d'être* being the mediation of power. Whilst the Tibetan state maintained a discourse of power embedded within a cosmological epistemology, internationally in the early twentieth century power was rationalised primarily in terms of economic or military might. Even the liberationist movements of nationalism and communism were committed to these principles as the primary grounds of action, not simply for resistance, but for social reconstruction. The implications of such a dynamic were highlighted by the British Consular Officer Eric Teichman in 1919, when he concluded, regarding the failure of Tibet and China to reach a lasting treaty agreement on their border, that Tibetan state existence was dependent upon modernisation:

‘After a British representative has been installed at Lhasa, and the country developed and thrown open to foreign enterprise, the danger of Chinese aggression would be a thing of the past. We should never be called upon to get whatever they required, and their economic resources developed with our assistance would easily stand on their own legs and have nothing to fear from China or anyone else’ (Lamb 1966:98).

Outwardly pragmatic, this is an approach that nonetheless implied the development of an entirely different social value system.

Part of the difficulty of arguing for Tibetan agency is that the framing of the discourse in modernist terms places the burden upon Tibetans to prove that they engaged with modernity. Hence the claim that the significance of the Mongol-Tibetan Treaty of 1913 is that ‘with Mongolia, Tibet initiated formal relations on a more modern basis’ (Van Walt Van Praag 1987:137). Similarly, the legal events of the Anglo-Tibetan Treaty of 1904 have been extricated from the historical event of Younghusband’s invasion and represented as the grounds for a modern Tibetan foreign policy: ‘the conclusion of a bilateral treaty between the British and Tibetan governments constituted implicit recognition by Britain of Tibet as a State and a subject of international law’ (Van Walt Van Praag 1987:131). Thus, it is the events

that mark the encroachment of Tibetan identity that become, paradoxically, the markers of its independence. This paradox leaves unresolved the encounter between Western imperialism and the discourse of modernity, and also excludes from view the fact that the Treaty of Urga was in itself not a modern development, as Tibet had independently concluded treaties with its neighbours since 821/823 AD; what changed was the context in which these relations occurred.<sup>57</sup> A defence of traditional identity is therefore constrained by the necessity that modernity must be embraced and appropriated as the primary mechanism of that defence.

### **6:3 The Simla Convention**

The Simla Convention of 1914 was prompted by the conflicting demands of Tibet, British India, British commercial interests in China, and the Republic of China. The Tibetan Government was a driving force behind the treaty negotiations, the Thirteenth Dalai Lama seeking to clarify Tibet's status and settle cross-border hostilities between Eastern Tibet and China. As far as British interests went, the Foreign Office had pursued talks with Russia in 1912, seeking a free hand for Britain in Tibet in exchange for recognition of Russian rights in Mongolia (Bell 1992:148-152). This intersected with the Dalai Lama's negotiations with Britain to place Tibet under formal British protection. However, as Russia demanded further concessions in Afghanistan and Persia, and Tibet had little commercial value to Britain, no new Anglo-Russian agreement was reached. Thus, the 1907 Anglo-Russian Treaty, the first international agreement to define Tibet as under Chinese suzerainty, remained in force. Following this failure, British officials believed a tripartite agreement with Tibet and China to be an opportunity to expand their rights in Tibet without violating the 1907 agreement. As with the 1904 treaty, British interests were to secure the Indian frontier. China's interests were to check British influence in Tibet, particularly in light of continued Russian activity in Mongolia. For the Yuan Government, the Tibetan issue was politically volatile. The Sino-Russian Treaty over Mongolia in 1913 had provoked

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<sup>57</sup> The 821/823 treaty survived as an inscription on the west face of the stone pillar at Lhasa, (Richardson 1978). See also IOR/L/P&S/10/343 for translations of the Tibetan and Chinese texts used in the Simla negotiations.

a domestic crisis over perceived loss of sovereign rights, prompting Yuan to expel the KMT from parliament.<sup>58</sup>

Tibet's goal of settling its border and balancing the competing powers was further complicated by the fact that hostilities were spread across an array of intrastate groups operating beyond the confines of the central government. The dissolution of the Manchu Empire led to a roaming population of disbanded Manchu soldiers and dispossessed Tibetan civilians, left behind in the wake of Chao Er-feng's civilising mission. Groups of hundreds of such people operated as bandits across the frontier regions, hostile to any external authority. On the Chinese side of the frontier, Yuan relied heavily upon the support of Northern warlords, and the situation in Sichuan was volatile. On the Tibetan side, Eastern Tibet was held by various Tibetan groups that answered to nomadic chieftains or sectarian Buddhist monasteries first and Lhasa second.

The Tibetan claims, with which the negotiations were opened, were clear. Beginning with an extensive discourse on the history of Tibetan-Manchu relations which placed all ties firmly in the context of cho-yon, the Tibetan delegation argued that the terms of cho-yon had been breached and that all reciprocal obligation on the part of Tibet was henceforth terminated. Given that the sole basis of Tibet's obligations to China under the terms of the cho-yon was the provision of the spiritual commodities of religious teachings and initiations, the termination of the alliance had been implicitly acknowledged by the new Government of China when it ceased to conduct such trade. The documentary evidence presented by the delegation traced cho-yon to written agreements between the Sakya hierarch Phagspa and Kublai Khan (McGranahan 2003:42-43). The later extension of the cho-yon alliance to Manchu China was detailed at Simla by documentary evidence presented by Tibet such as the edict of the Fifth Dalai Lama regarding Monpa (McGranahan 2003:42-43).<sup>59</sup> The Fifth Dalai Lama (1617 – 1682), being responsible for the reforms that established the institutions of law and governance still in existence in 1914, was cited extensively in

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<sup>58</sup> Smith 1996:189, Goldstein 1989:Ch1, Bell 1992:Ch16. Bell, as Political Officer for Sikkim, Bhutan and Tibet, was intimately involved in the Simla negotiations and its preceding events.

<sup>59</sup> For a translation of the Monpa Edict, see Aris 1979.

Tibetan evidence at Simla, the delegation possessing detailed records from that point onwards regarding the Lhasa government's administration of territory.

In the conclusion of his critique of 'Nationalist Thought in the Colonial World' Chatterjee argues that despite success in challenging 'such blatantly ethnic slogans of dominance as the civilizing mission'... 'Nowhere in the world has nationalism qua nationalism challenged the legitimacy of the marriage between Reason and capital.' He continues, 'the nation state now proceeds to find for *the nation* a place in the global order of capital, while striving to keep the contradictions between capital and the people in perpetual suspension' (Chatterjee 1986:165). Such a dynamic is discernible in the Republic of China's opening statement at the Simla Conference: 'What sacrifices China has made in money and lives for the sake of protecting Tibetans and their territory,' the delegation argued, placing the historical relations between Tibet and China in the framework of a wider discourse in which the rationale for state existence is allied to economic development. The assertion presents a very different vision of sovereignty to that articulated in the Tibetan statement, which claimed the sole purpose of the Manchu alliance with Tibet was for 'the then Government of China being to earn merit for this and for the next life' (Smith 1996:190). The Republic of China asserted that owing to the material costs of the alliance, there must, rationally, have been a territorial advantage to the Manchu Court and an extension of sovereignty. The Tibetans, however, located the Manchu's actions within a cosmological framework in which advantages gained by the Manchus are measured on a vastly expanded temporal scale, good action leading to good reward, but not necessarily in this life, nor in strictly material terms. The initiation of hostilities between the Qing and Tibet in 1908, in the context of the court's loss of faith in Buddhism, signalled the termination of this positive and reciprocal accumulation of merit for both parties. 'Tibet and China have never been under each other and will never associate with each other in future. It is decided that Tibet is an independent state and that the precious Protector, the Dalai Lama, is the ruler of Tibet in all temporal as well as spiritual affairs' (Van Walt Van Prag 1987:54).

If the framing language of the Chinese case was more compatible with the wider discursive trends of modernity, then as far as empirical evidence was concerned it was the Tibetan delegation which had the strongest position. A primary concern of

the conference was to demarcate the entire Tibetan border, and the Tibetan representative presented a corpus of original documents dating from the Seventeenth century onwards in support of Tibetan claims to frontier territories. These included details of various administrative matters such as tax, Tibetan government subsidies and records of land tenure. In contrast, according to Sir McMahon, the British plenipotentiary, the Chinese delegate 'showed evident signs of panic,' possessing no such records in support of the republic's counter claim (IOR/L/P&S/18/B206). Instead, the Chinese representative claimed that his case rested upon 'China's position in international law, by which Chao Er-feng's effective occupation of the country cancelled any earlier Tibetan claim' (IOR/L/P&S/18/B206, IOR/L/P&S/10/343). The weakness of this position was soon exposed, for apart from its implicit recognition of previous Tibetan sovereignty, the Manchus had been expelled from Tibet by the Tibetan army in 1910, and a peace treaty detailing the terms of withdrawal signed by the Imperial Court following mediation by Nepal.<sup>60</sup> Therefore, the negotiations remained focused upon frontier territories and the issue became less about sovereignty than about where the border between Tibet and China lay. It was failure to agree on the border that ultimately stalled the negotiations (Bell 1992:156). Yet, after Simla the Chinese continued to claim sovereignty, a position somewhat at odds with the considerable effort made to extricate the details of what frontier territories were under Chinese rule and which were under the Tibetan government.

The Simla Conference incorporated four agreements. The first of these was a bilateral agreement between Tibet and Britain which established the Indo-Tibetan frontier. The agreed line was incorporated into Article 9 of the tripartite Simla Convention, which also defined the borders of Inner and Outer Tibet on the Chinese frontier. In addition to this, a separate Anglo-Tibetan Declaration was agreed to which the Simla Convention was appended. It was this declaration which confirmed that the Simla Convention would be binding upon the Governments of Great Britain and Tibet, and that unless ratified by China, China would be debarred from all privileges within. A separate agreement was also concluded which set forth new trade regulation between Britain and Tibet, replacing the Trade Regulations of 1893 and 1908.

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<sup>60</sup> See Bell 1992:Ch16, and Mishra 1992:Ch3, using official Government of Nepal records.

In the event, the Simla Conference served only to confuse Tibet's status, although the British made considerable territorial gains in the forging of the separate agreement with Tibet concerning the Indo-Tibetan border. These concessions were won from Tibet after British promises to support Tibet against Chinese aggression, an agreement on British supply of arms and munitions being made in relation to this. Tibet was thus persuaded to sign a final treaty which recognised China's suzerainty over Tibet, but this was only initialled by China and never ratified. As a result, Britain and Tibet concluded the treaty on the basis that China, by withdrawing, lost all benefits accrued within, including that of suzerainty. However, British practice did not subsequently affirm Tibetan independence. 'By our past intervention in Tibetan affairs we have incurred certain moral obligations towards the Tibetan people which cannot be ignored,' the India Office noted in 1914 (IOR/L/P&S/18/B324). But, despite the bilateral Anglo-Tibetan agreement denying Chinese suzerainty, the British prevaricated, proceeding largely on the basis that Tibet was most profitable as a neutralised buffer state. Thus, the *Foreign Office's Handbook No.70* published in 1920 states that 'outer Tibet would become an autonomous state under Chinese suzerainty and British protection' (Spence 1995:918). Accordingly, the British sought to limit Tibetan assertiveness, this being confirmed by the Tibetan government statement of 1918: 'As the Great British Government is the Protector of Tibet, we cannot disobey their orders about not attacking the Chinese' (Spence 1995:919).

Norbu identifies the treaty's true significance as being 'the realisation that dawned upon the British Government that no treaty concerning Tibet can be meaningful without Tibetan participation' (Norbu 1990:59). The Simla Convention did affirm British recognition of Tibet's independent treaty-making powers, but did not lead to meaningful clarification of Tibet's status. As discussed in Chapter five, the term suzerainty is problematic in the context of the rise of modern institutions, suggestive of an incapacity of self-governance.

It is at this point that the disjuncture between jural definitions of statehood and modern liberalist conceptions of the state's function becomes visible. If substantive law is the criterion for evaluating Tibet's status prior to the PRC takeover, then the evidence weighs heavily in favour of Tibet's *de facto* statehood. The strongest support for this assertion concerns the period from 1913-1951, although the historical



evidence surveyed in Chapters 2 and 3 suggests that such a claim extends back in time prior to the fall of the Manchu Dynasty. With regards to Tibet's status between 1913 and 1951, the prerequisites of a people, a territory, a government and the capacity to enter into relations with other states have all been demonstrably proven. Additional factors relevant to a consideration of sovereignty include the maintenance of separate armed forces, the independent right of making peace, war, and treaties, the possession of a separate flag and *jus legationis*.<sup>61</sup> Tibet demonstrated all of these between 1913-1951, pursuing an independent policy of non-involvement in the Second World War and the Sino Japanese war, conducting treaty relations with Britain, Nepal and Mongolia and independently appointing and receiving diplomatic agents.

The use of the term *de facto* rather than *de jure* is linked to the use of the term suzerainty to describe Tibet's traditional policy of delegating elements of its foreign affairs to Manchu China. It is clear that such a delegation of powers did not occur after the fall of the Manchu dynasty, although the use of the term suzerainty persisted in diplomatic usage. The British applied the term in the Simla Convention as a device to bring an agreement between Tibet and China regarding Tibetan *de facto* independence and the Republic of China's assertions of sovereignty over territories under the influence of the Qing Empire. China's suzerain rights in Tibet had first been given international recognition in the Anglo-Russian Treaty of 1907, but the use of the term in the 1914 treaty differed in that it was conditional on China's recognition of Tibetan autonomy within a clearly defined border. The term *de facto* independence therefore became used alongside the term suzerainty (which was sometimes qualified as nominal) and the term autonomy. This struggle over semantics, which became the key feature of the Simla negotiations, has dominated subsequent considerations of Tibet's status.

#### **6:4 Suzerainty in Postcolonial Legal Discourse**

To illustrate the effect of this confusion over terms, the analysis provided by Crawford (1979) in the 'Creation of States in International Law' is significant. Crawford's study remains one of the few mainstream works of international law to

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<sup>61</sup> See Judge Sefariade, Dissenting opinion, *Lighthouse in Crete and Samos* case, P.C.I.J., Series A, Nos. 20/1, Judgement 14 1929:44.

give any consideration to Tibet's status prior to 1951, and the treatment it receives is in context one of relative sympathy: 'The case of Tibet highlights the rather arbitrary way in which, for their own purposes, the 'Powers' decided upon a particular course of action, and thus, in effect, determined the status of a people' (Crawford 1979:213). Nonetheless, Crawford concludes that in the case of Tibet 'normal classifications of 'sovereignty' and statehood are only applicable with difficulty, and the facts are often obscure and controversial.' To be considered alongside this comment is Crawford's decision to treat Tibet circa 1911-1951 as an example of an autonomous region rather than an illustration of a vassal state, a decision based upon the 1914 Simla Treaty, Article 2 of which stipulates 'The Government of Great Britain and China recognising that Tibet is under the suzerainty of China, and recognising also the autonomy of Outer Tibet, engage to respect the territorial integrity of the country, and to abstain from interference in the administration of Outer Tibet.' On the basis of this, Crawford concludes that 'Tibet was not in 1914 regarded as independent, but that at least part of the country possessed substantial autonomy.' For Crawford, this therefore supports the legitimacy of the PRC's military takeover in 1951, although the legality of China's actions after that point remains open to question.

The importance of this case study is that it reveals a number of key contradictions. Firstly, it is assumed that the use of the word 'autonomy' in Article 2 overrides the use of the word 'suzerainty'. This establishes continuity with the contemporary situation, which presents the Simla Convention as a logical precursor to the incorporation of Tibet into the PRC as an autonomous region in 1951. As Crawford (1979:211) puts it, 'Autonomous areas are regions of a state, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the state of which they are part.' However, the British usage of the term with regard to pre-1951 Tibet did not imply such a restricted definition. The word autonomy was used interchangeably in diplomatic documents with independence or *de facto* independence, and seems to have been used to qualify the term suzerainty, underlining the designation of China's powers as nominal. The logical reference point for the application of the term in 1914 is not the attitude of international law to autonomy after 1951, but the views of British India on suzerainty in 1914.

The British Government of India relied upon the concept of suzerainty to establish relations between itself and the princely Native States, which were regarded as internally self governing, extra territorial entities whose rulers were afforded sovereign immunity. Crawford uses the Native States as an example of suzerain-vassal statehood, a category placed further up the hierarchical tree of independence than autonomy and classified separately from Tibet. His assessment of suzerainty is that it defines the relationship between a dominant and dependent state, which differs from a protectorate ‘only in that certain of its incidents are more likely to be undefined, or to involve general claims of supremacy’ (Crawford 1979:210). Thus, unlike autonomous regions, vassal states possess some form of international personality. British practice did not ascribe to this view; in 1891 and 1928-9 the British Government of India drew the line around the Native States’ rights in international law by claiming that ‘the principles of international law have no bearing upon the relations between the Government of India...and the Native States under the suzerainty of Her Majesty. The paramount supremacy of the former presupposes and implied the subordination of the latter’ (Crawford 1979:210).

In contrast to this, the British Government of India did wish to promote the view that Tibet was a subject of international law. Indeed, it is hard to conceive that the Simla Convention would have proceeded at all if this had not been the case. In particular, the British pursued separate talks with Tibet to negotiate the Indo-Tibetan border, this resulting in an Anglo-Tibetan agreement, and China was expressly barred from these talks on the basis that the Indo-Tibetan frontier was not a direct Chinese concern. As Charles Bell, the British Political Officer of Sikkim, Bhutan and Tibet recorded, ‘it was my duties to negotiate with the Tibetan Plenipotentiary the frontier to be established between Tibet and north-Eastern India...I was able to gain Sha-tra’s consent to the frontier desired by Sir Henry, which stands back everywhere about one hundred miles from the plains of India’ (Bell 1992:155-6). Whatever conclusion is drawn regarding British imperial motives, this is a fair indication of the British position regarding Tibet’s independent treaty-making powers. In this context, the British emphasis on the word autonomy is designed to distinguish Tibet from the the Indian Native vassal states. The British intention was to imply that Tibet did possess some measure of international personality. For this reason, it would be hasty to conclude, as Crawford does, that the British view that relations between themselves

and the Native States were not governed by international law 'seemed to be founded on the erroneous view that international law only governed the relations of independent and equal states' (Crawford 1979:210). It is unlikely that the British practice was impelled by a process of legal reasoning over and above political will. Rather, suzerainty operated as a flexible term with multiple possibilities for the conferring of rights and obligations according to political needs.

To return to Crawford's analysis of the Native States, the implication is that the British practice followed certain legal assumptions. Indeed Crawford's entire approach is to emphasise and affirm the primacy of law. Thus, the Crown's position regarding the status of the Native States in 1891 and 1928-9 was the result of an erroneous view, because the Crown failed to uncover the truth of law. In contrast, the view the Crown held in 1947 when the Native States were regarded as independent and free to accede to India or Pakistan, or neither, was the correct legal truth (Crawford 1979:210). Supporting this reasoning is the decision of the ICJ in the *Raan of Kutch Arbitration*, which held that international law only ceased to apply to suzerain-vassal relations which had been replaced by specific clauses in treaties. However, the *Raan of Kutch Award* occurred in 1968, and whilst the case establishes a legal position, it does not follow that this is the position which operated as the 'legal truth' behind British policy on the Native States in 1947 (Crawford 1979:210).

Given the widespread communal rioting, political factionalism and the controversy surrounding partition it seems curiously ahistorical to postulate a position which would have required Lord Mountbatten to have placed positive law first and politics second. Creating the necessary alliance which sealed independence was by no means a question of simply applying a judicial decision based upon substantive law, but a matter of forging a workable consensus in the midst of disparity. Likewise, in 1914, to consider as Crawford does that the Simla Treaty presented 'good evidence of what the parties thought Tibet's status was at the time, or perhaps what they hoped Tibet could successfully claim' (Crawford 1979:213) is to place priority on a concept of law in which law is representational of truth and aspirational; a repository of the optimum. Erased from view are the necessary compromises traded behind the scenes, such as, in this example, Tibet's ultimate compromise on recognition of its sovereignty in return for a separate agreement with Britain in which the British pledged to supply

Tibet with arms to strengthen her border defence against China (IOR/L/PS/10/433 and Mss Eur F80/202).

Crawford's analysis achieves coherency only if the relative autonomy of law is presumed. The historical facts follow the law, because the law is seen as a vehicle for truth, an artefact that achieves representational value beyond the circumstances in which it was formed. Thus the attitude of the PRC on the liberation of Tibet, that Tibet was a province of China, achieves continuity and coherence if the term autonomy used in the Simla Convention is given equal meaning. The legally inconsistent British attitude to Native States in 1891 and 1928-9 is shown not to infer a dilution or inconsistency in law because the practice was based upon a false perception of the law. Thus, it is not portrayed as entirely beyond law because political will is not presumed to have operated with untrammelled freedom. The key notion that politics are subordinate to the Rule of Law is maintained. The error lay not in limitations of the law, but in the limited view of those that sought to apply it. The tendency to ahistorically and retrogressively bring past behaviour into line with the present is part of this dynamic of representing law as coherent, rational and autonomous.

When Crawford states that 'in cases of 'autonomous regions' such as Tibet or Oman, normal classifications of sovereignty and statehood are only applicable with difficulty and the facts are often obscure and controversial' (Crawford 1979:213), the implication is that in such obscure instances enquiry can legitimately begin and end with what key legal texts exist, in this case the Simla Convention. The effect of this is to empty law of history. A number of key points are masked by an underlying disciplinary tendency to project law as a synthesis of the essential truth of an historical situation.

Firstly, there is the question of why the British Government chose the term suzerainty, despite recognising Tibet's de facto statehood in internal documents. The dynamics of a legal analysis which seeks an underlying coherence and historical continuity in key terms such as suzerainty and autonomy will be predisposed towards accepting that the use of the terms in a legal text reflects contemporary definitions. This deemphasises discrepancy and variance, and privileges ahistorical definitions by projecting received contemporary notions of suzerainty and autonomy onto the past. In

assuming the internal coherency of law, these terms are imbued with an excess of meaning, belying the possibility that their function may have been much more superficial in the context of the political reality of the event. By privileging the continuity of law as a system of objective thought, the effect is to dislocate it from its temporal origins. The alternative, however, is to accept that law is subject to the whims of political diplomacy, which negates its grounds. It is this split between the desired supra-social functionalism of law and the contingent factors that bring law into being that is displayed in Crawford's analysis of suzerainty and autonomy.

Secondly, there is the question of what effect privileging legal continuity and coherency has upon the understanding of how norms come into existence. Underlying this is the modernist faith in progress and linear history, in which the present affirms its own logic by appropriating what came before as a step on the path to development. Whilst the temporal roots of the law may be deferred, along with other contingent factors such as politics, morality, economics and culture, this is not to say that a conception of origin is removed. A quasi-origin is retained, purified of unnecessary elements that may destabilise the certainty and rationality of legal process. In the example of Crawford's analysis above, this is evident in the way in which contradictory state practice is approached. As discussed, the British practice of not recognising international law with regard to the Native States in 1891 and 1928-29 is seen as an error of legal perception rather than an expression of political will. The effect of such a method of explaining discrepancy is to uphold the logic of established legal principles in current usage. The effect is also, however, to mask the origins of state practice.

What is revealed here is the old Austinian dilemma of how states can both create law and be bound by it in the absence of an overarching sovereign. To maintain the autonomy of law and retain its authority in such a society, law to some extent must always already be in existence. Because, paradoxically, states create law, the concept of evolutionary progress becomes key to resolving the inherent contradictions. 'Progress does not just go somewhere it comes from somewhere' observes Fitzpatrick in his discussion of the mythic origins of modern law (Fitzpatrick 1992:51). Because the idea of progress is bound to a faith in the universal applicability of reason, the origins of law, as a feature of this, can always be treated as a pre-existing step on the

path of rational progress. Such a discursive displacement of origin has the effect of placing the authority of law beyond contingencies, creating that ‘slippage from the epistemic to the ontological’ described by Schlag (Schlag 1997:440).

In the case of our current example, the British practice towards Native States is sidestepped, leaving the desired vision of rational order intact. It may well be that the alternative, more inclusive, opinion of the ICJ as demonstrated in the *Raan of Kutch* Arbitration is perceived as a more suitable point of reference for international legal practice, bearing a postcolonial sense of equality. It may also be considered that the imperialist arrogance of the British position may be considered an undesirable practice to retain. What is of interest here, however, is the outcome of such a method of legal analysis. One effect is to remove alternative practice from view. The tendency to fit state practice into a pre-existing vision of what the law is, or should be, not only excludes contradictory practice from the frame, but enforces a concept of the state as a rational entity developing in accordance with the progressive trends displayed by international law generally. If such a dynamic is accepted as ordinary and real, rather than perceived as arbitrary and constructed, the question then becomes to what extent violence and injustice are rendered invisible by international law’s capacity to create coherency and legitimacy from a vision of state practice that is both limited and ahistorical. To return to the example of the British Native States, firstly unfettered political action is presented as subordinate to law, for the British actions are presumed to be based on law. Secondly, colonial manifestations of law are subordinated to progressive modern law, for the British actions were based upon ‘false’ law. Modern law itself emerges unscathed from the colonial encounter in this analysis. Thirdly, because the colonial vision of international law not applying to unequal states is explained as a failure to grasp the underlying truth of law, modern law is presented as continuous and pre-existent.

This reading of Crawford’s analysis introduces the fundamental issue of international law’s relationship with history. It reveals the effect that the reification of law, the drive to make law operate above and beyond a particular temporal, cultural and geographical location, has upon perceptions of what is open to legal consideration. The obvious paradox here is that the maintenance of law’s coherency and continuity, integral to its universalistic claims, requires the exclusion of certain voices, be they the

now unsavoury expressions of colonialism or other articulations of the local and the particular which threaten the general vision of modern international law's unity (Kennedy 1996:386).<sup>62</sup> Hence, it becomes reasonable to present the existing status quo as normal and rational in light of 'obscure and controversial' facts, without questioning why or how obscurity is manufactured and maintained, or what this may reveal about underlying mechanisms of power.

In the example of Crawford's case study, this tension between the general and the particular is reflected in the pairing of the view that 'Tibet was not in 1914 regarded as independent' and that this is affirmed by 'the Chinese view in 1951' with the apology 'the case of Tibet highlights the rather arbitrary way in which, for their own purposes, the Powers decided upon a particular course of action' (Crawford 1979:213). The de-emphasis upon politics that is the underlying dynamic of the overall analysis does not succeed in removing the political elements of expediency from the frame. Realistically, it cannot if the overall vision of a rational, humane, morally justifiable system of law is to be maintained, alongside the claim for its universal legitimacy. This is particularly so in a case such as Tibet, where there has not been any sustained commitment to violent action in pursuit of independence, but where evidence of aggression towards the Tibetan people by the PRC has been significant.<sup>63</sup> This tension is resolved in Crawford's analysis by displacing the issue of injustice by calling on the discourse of human rights: 'it may still be that Chinese actions in Tibet after 1951 have been illegal on other grounds.' These manoeuvres therefore achieve a delicate balancing act in which the concept of the universal rationality of state-driven international law is implicated in and perpetuates the concept of the primacy of the modern state as the vehicle and expression of this law. Any irregular historical events and subversive social visions that destabilise this structure are marginalised as a result of an underlying contradiction in the discourse as a whole, which requires that the existing modern state structure of international society is given priority.

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<sup>62</sup> Kennedy discusses this: 'Modernists all, today's international lawyers remain acutely aware of what it means not to be modern, and this, more than any doctrinal or theoretical heritage, remains with us as the nineteenth century we are glad to have done with.'

<sup>63</sup> For detailed evidence and testimony relating to genocide and human rights abuses before 1959, see the International Commission of Jurists 1960.



Earlier in this discussion, the possibility was raised that a component of this dynamic was the drive to cleanse modern international law of the vestiges of colonialism. Hence, the pre-1947 British policy on Native States is seen as an erroneous view of law. This ‘othering’ of colonialism raises several questions which bear directly upon the status of Tibet, but also on the subject of international law generally. There is the possibility that such a purging erases valuable information from the received narrative of modern law. The dominant story of international law in which the inequalities of colonialism are resolved by making the scope of the law more inclusive, particularly through institution building, suggests that the colonial features of law were removed in the process. Yet, this story of law’s ever expansive inclusivity masks so many instances in which obscurity and anomaly are excluded from the final narrative of what international law should be, such as extraterritoriality, the rise and fall of *rebus sic stantibus*, suzerainty, or the status of Tibet, that the account of international law as coherent and continuous potentially becomes the real anomaly.

The story of modern international law’s evolution from the particularity of colonial arrogance to the universality of a rights-driven global order provides the underpinning logic for Crawford’s dismissal of British attitudes to the Native States as a matter of misperceived law. Within the context of such a narrative, his analysis is rational, coherent and appropriate. It is an equation which does, however, fundamentally rupture the relationship of the present to the past, altering radically what is perceived as history. There is, I argue here, a direct association between this discursive tendency of suppressing the colonial antecedents of international law and the treatment of Tibet as an autonomous region rather than an independent self-governing society that met the jural prerequisites of statehood. It is a comparable hidden appropriation of history that renders Tibet a problematic case for legal analysis, not simply because ‘the facts are obscure or controversial’ (Crawford 1979:213), but because the dynamics of dominant legal discourse fundamentally require that they must be and must remain so in order to resolve the problem of modern international law’s progressive inclusivity in relation to its colonial origins. It may seem paradoxical to assert that a country never directly under Western colonial rule should create such a dilemma for the postcolonial world, but this paradox is made understandable if the wider relationship between colonialism, Third World nationalism, international law and modernity’s faith in material progress is considered.

Before proceeding to examine this interaction between modernity, nationalism and international law through an analysis of Tibet's efforts to join the U.N. in 1949 and Tibet's final capitulation to PRC rule under the Seventeen Point Agreement in 1951, a preliminary conclusion will be made, and that is that a suppression of anomaly in the narrative of modern international law's progressive universality has implications for any understanding of power relations. This recalls Foucault's argument that 'History does 'not' gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instils each of its violences in a system of rules and this proceeds from domination to domination' (Foucault 1984:85). In suppressing the anomaly of colonialism, international legal discourse fails to adequately address conceptual and structural continuities that exist between universal vision of the present and the imperial past. Not only does this 'othering' elevate the moral status of previous colonial powers, who now become guarantors of rights rather than oppressors of rights, it also displaces traditional societies that do not fit the template of the modern state. For example, whilst the inclusion of the Third World in international institutions after decolonisation prompted significant debate as to the direction that international law should take, and encouraged the development of new doctrines such as Permanent Sovereignty over Natural Resources (PSNR), the expansion of international society did little to challenge existing models of modernisation previously implicated in colonial discourse. This is a theme taken up by Rajagopal in a discussion of the New International Economic Order's (NIEO) attempt to foster international equality, peace and development:-

'While NIEO proposals radicalised and expanded the U.N. as an institution, the limited nature of these proposals also had the effect of institutionalising the radicalism that was emerging from the Third World. In other words, the radical challenges to international law levelled by NIEO proponents had the paradoxical effect of expanding and strengthening international institutions as the apparatuses of management of social reality in the Third World, and, thereby, international law itself' (Rajagopal 2003:74).

This fundamental linkage between the modernisation process and the development of stable nation-states undercuts the assumption that:-

‘The San Francisco Conference produced an (eventually) inclusive and largely non-interventionist international legal order. The U.N. was given no explicit mandate to promote particular ideological forms through military intervention and the admissions policy of the U.N. was pluralistic’ (Simpson 2004:295).

The possibility remains that this pluralism and ethic of inclusion was fundamentally limited by a correlation between the nation-state as an independent sovereign unit and the nation-state as the vehicle for modernisation and development. It is at this juncture that the jural conception of the state comes into conflict with the normative political notion of the state. One of the ways that a suppression of anomaly in the narrative of modern international law’s progressive universality has implications for an understanding of power relations is, therefore, that by placing modernisation and industrialisation at the heart of a nation-state building project, alternative discourses of the state are excluded from consideration. Secondly, the suppression of anomaly creates a predisposition towards accepting that anomalies are excluded for valid legal grounds by privileging a vision of coherency and continuity in international law generally. Thirdly, by linking the two, the space left for the articulation of an alternative discourse of the state is not simply reduced, but displaced. This slippage allows alternative discourses of the state to be treated as aspects of culture, rather than features of sovereignty, and these discourses are thus open to appropriation by states that conform to the dominant vision of modernisation and development.

## **6:5 The Tibetan Trade Missions**

One of the key, but often unrecognised, factors in deciding Tibet’s status was neither the policy of Britain nor China, but that of independent India. Whilst India inherited much of the contradiction and many of the ambiguities of British policy, embedded as they were in treaties such as the 1914 Simla Convention, Nehru’s ‘spirit of the age’ modernity presented Tibet’s commitment to its traditional institutions as indefensible (Chatterjee 1986:143). Before further examination of this disjuncture between tradition and modernity in the postcolonial context, and its intersection with received notions of Tibet’s legal status, it is necessary to present a brief historical summary of post-Simla developments up to Indian independence.

After 1914, the border issue between Tibet and China remained unsettled. The Simla Convention had divided Tibet into Inner (Eastern) and Outer (Central-Western) zones, with the Tibetan Government being guaranteed political and religious authority in Outer Tibet only. Inner Tibet was seen to be under religious control of Lhasa, but its political control was left undefined. Article 9 stated 'Nothing in the present Convention shall be held to prejudice the existing right of the Tibetan Government in Inner Tibet, which include the power to select and appoint the high priests of monasteries and to retain full control in all matters affecting religious institutions.' The reality was that the division of Tibet into two zones was never implemented and the borderlands remained subject to a complex network of traditional alliances, local and national, religious and political, Tibetan and Chinese.

In 1918, hostilities broke out which brought the unresolved issue of the border to the fore. Following Tibetan victory, the British Vice-Consul, Eric Teichmen, at the Chinese border town of Tachienlu, mediated in a Sino-Tibetan agreement, the Treaty of Rangbatsa (Teichman 2000:115-122 and 161-169). Central to the negotiations was the Tibetan claim to Nyarong, a territory which the Tibetan Government believed to be under their full jurisdiction according to Article 9 of the Simla Treaty. This claim confused the British, who believed Nyarong to be, as an Inner Tibetan town, under Chinese influence. The Tibetan Government, however, interpreted Article 9 as an affirmation not only of religious authority, but of their civil and military protection of ethnically Tibetan regions that maintained a more autonomous local leadership system than that found in Outer Tibet. The British concluded that the Tibetan interpretation of the treaty was due to faulty translation of the original English treaty text.<sup>64</sup> However, the root of the conflict was ideological, concerning the limits of religious authority and the intersection of locality with Tibetan Buddhist networks. The British considered that the division of Inner and Outer Tibet was possible on the basis of a relatively straightforward separation of religious and secular authority, whereas to the Tibetan Government such a distinction was considerably more complex. The disagreement reveals something about the perceived role of the state in relation to locality and the relationship of both to a wider context of civilisation. The problem for the Tibetan Government in 1918 was that the borderlands resisted definition as part of a Tibetan or

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<sup>64</sup> McGranahan (2003:49) referencing Campbell letter to Grant, Camp Pharijong, 17 September 1918, IOR L/P&S/10/714/1.

a Chinese *state*, yet ethnically and culturally were identified as part of a Tibetan civilisation. Teichman records that Eastern Tibetan states on the Sichuan border were semi-independent, but under nominal protection of China. However, the actual authority of Chinese officials is questionable and Teichman records that positions were fabricated so that inhabitants could claim salaries from Chinese authorities (Teichman 2000:8). The tenuous nature of the Chinese claim is further apparent in Chinese sources. In a 1912 book, Fu Sung Ma, the Imperial Chinese Commissioner for Sichuan and Yunnan Frontier Affairs under Zhao Erfeng described the border, stating that of the territories east of Bathang, 'some...were really quite independent of China.' The book also records that Bathang, Lithang, Derge and Chamdo were under their native chiefs or monastic leaders, that Ngarong, Dragyab and Dzayul were under the Tibetan Government, and that Shobando Riwoche and Markham had been ceded to Tibet by the Manchu Emperor between 1725-27. Following this, on the ground survey Fu concluded that the 'Chinese had no right of interference in the secular administration of these territories' (IOR EUR MSS F80/177).

It is the existence of self-administrating localities which received 'nominal supervision' from Sichuan provincial authorities which presented the biggest difficulty, for the salaried Imperial Chinese posts in ethnically Tibetan regions did not necessarily create a local cultural identification with China. On the other hand, the monastic institutions and Buddhist values of the region did create local cultural identification with Lhasa. After the 1911 revolution in China, Sichuan itself was largely independent of the new government in Beijing, being 'controlled by several mutually independent military chiefs' (Teichman 2000:121).

When the Chinese Communist Party secured control over China in October 1949, the Tibetan Government increased efforts to obtain international recognition and support. The vulnerability of the Tibetan position was evident from increasing Chinese presence in ethnically Tibetan regions along the *de facto* border recognised by the Tibetan Government since Simla. Also, the Communists had fostered irredentist policies that had won them popular support in the Chinese civil war. This appealed to nationalist sentiments in the wake of the Sino-Japanese War and gave force to Mao's general insistence that China had 'stood up' (Mao 1967:411-24).

Two years prior to Communist victory in China, the Tibetan Government sent trade missions to India, China, the United States and the United Kingdom, in order to demonstrate independence and promote direct trade. The mission to India was officially received by Lord Mountbatten, Prime Minister Nehru and Mahatma Gandhi and, despite Chinese protests, was also received as an official mission in both Britain and America, the status of the delegation being further confirmed by the stamping of Tibetan state passports with requisite travel visas.<sup>65</sup> The mission was not without controversy, however, as both Britain and America were wary of upsetting relations with China. Thus, the U.S. agreed to sell Tibet two million dollars of gold to back the Tibetan currency, but refused to provide a loan to support the deal. This situation could not be resolved without intervention from the Government of India, upon which Tibet was dependent for hard currency and foreign goods.

As a landlocked country Tibet's foreign exports passed through the port of Calcutta, with the Indian government controlling tariffs. The major export was wool, with the U.S. being the largest final purchaser via U.S. agents in India. The foreign exchange generated was held by the Reserve Bank of India and credited to Tibet in Indian Rupees. The Tibetan Government objected to this, arguing that they had a right to receive the total in dollars, an amount they estimated at two to three million dollars per annum. The Indian refusal to release funds from the Tibetan account in dollars was therefore a serious setback for the Tibetan Government's economic plans (Goldstein.1989:Ch16; Shakya 1999; Shakabpa 1967). This refusal was marked not just by economic self-interest but by an imperialistic arrogance that reveals something of Nehru's attitude to modernity. Thus, the Indian Government justified their position by implicating that they knew what was best for the Tibetan Government. As the deputy secretary of the Ministry of External Affairs explained to the U.S embassy, 'the Government of India did not consider the import of gold as an essential import' (U.S. Department of State 1949:1064; U.S. Department of State 1948:777,780). By 1949 the Government of India had conceded that the Tibetan Government could withdraw 250,000 dollars from their account, but only if the dollars were used for the purchase of machinery. By April, the Government of India finally gave permission for the purchase of gold.

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65 See Shakabpa (1967) for a first-hand account by the Tibetan Government minister and member of the delegation.

The conflict between Tibet and independent India originated before independence. The first official meeting between Indian Congress and the Tibetan Government took place in 1946 in the pre-independence transition period at a semi-official conference of Asian countries convened by the Indian Council of World Affairs. Tibet was invited to participate alongside thirty-two countries, the British representative in Lhasa seeing this to be a good opportunity Tibet to demonstrate its *de facto* independence (Goldstein 1989:561). Despite opposition from Chiang Kai shek, the conference itself was a success for Tibet. Nonetheless, Nehru, acting as Vice President and Member in Charge of External Affairs of the Interim Government of India, refused point blank to discuss Indo-Tibetan border demarcation and trade agreements with the Tibetan delegation. This attitude is consistent with Nehru's commitment to a Pan-Asian regional alliance led by India and China, a commitment given specific reference in the Indian policy to review Indian support for Tibet on the basis that:-

‘while the Government of India are glad to recognise and wish to see Tibetan autonomy maintained, they are not prepared to do more than encourage this in a friendly manner and are certainly not disposed to take any initiative which might bring India into conflict with China on this issue. The attitude which they propose to adopt may be best described as that of a benevolent spectator’ (FO371/63943).

The Indian position was never merely that of benevolent spectator. Firstly, the Indian Government wanted to retain the benefits of the British Indian-Tibetan treaties, as indeed was its right. It was on this basis that India claimed authority to restrict Tibet's access to currency, Tibetan rights being circumscribed by Article IX of the 1904 Lhasa Convention. Additionally, India claimed Tibetan territories ceded under the 1914 Simla Convention, of which the Tibetan government sought the return at Indian independence, along with other territories seized by British India such as Sikkim and Darjeeling (Yang 1987:410). Due to lack of consensus in the Tibetan Government over the wisdom of renegotiating the Simla Treaty with the newly independent India, Tibet held off recognising the Government of India as legitimate successor of the British (Goldstein.1989:606). This policy remained in place up to the gold crisis of 1948-9, due to India's refusal to negotiate over the territorial dispute.

As the PLA forces gathered upon the Tibetan border in 1949, Tibet's international status was uncertain. On the one hand, participation in regional diplomacy and the U.S. and British recognition of Tibetan passports indicated that Tibet had some form of international personality. On the other hand, the exact nature of this personality remained undefined. Tibetan independence had been formally recognised by Nepal in 1949, when Nepal presented a dossier of evidence to the U.N. supporting Nepal's application for membership of the General Assembly. As proof of sovereignty, Nepal affirmed its power to conclude treaties with reference to Nepalese-Tibetan agreements, and provided details of the six countries where Nepal maintained legations, these being the United Kingdom, France, the United States, India, Burma and Tibet. Nepal had no official relationship with China.<sup>66</sup> Even Shen Zonglian, the last official Chinese Representative in Tibet, concluded that 'since 1911 Lhasa [i.e. the Government of Tibet] has to all practical purpose enjoyed full independence' (Van Walt Van Praag 1987:139). As early as 1945, the British had, however, concluded that whilst there would be 'advantage in bringing the position before the United Nations...it is realised that the Chinese may be able to render such a course ineffective' (Goldstein. 2007:545; L/PS/12/4195A). This position was given more forcible articulation in 1949 when the Tibetan Government dispatched two official missions to the U.S. and the U.K. to discuss the appeal to the U.N.

Following the inauguration of the PRC on the 1<sup>st</sup> of October 1949, the Government of Tibet sought clarification of its international position by sending missions to the United States, Britain, Nepal and India. Having requested that the Chinese Communist Government respect the territorial integrity of Tibet, the Tibetan Government sought foreign military and diplomatic aid and support for their application to the U.N. These missions were assembled in December 1949, but were blocked from proceeding by both the United States and Britain. As a goodwill gesture, the Tibetan Foreign Affairs Bureau had granted travel permits to two Americans for transit across Tibetan territory. The resulting diplomatic engagement of the Tibetan Foreign Affairs Bureau with the U.S. Embassy in New Delhi highlights the impossibility of Tibet's position. As with the purchase of U.S. gold earlier in 1949, the American Government was happy to engage with the Tibetan Government in practice so long as formal recognition of this did not occur. The U.S. Embassy was therefore at

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66 Van Walt Van Praag.1987:139, referencing U.N. Security Council Document S/C2/16, 8 August 1949 and Enclosure 1-6.



pains to correspond with the Tibetan Foreign Affairs Bureau orally, rather than in writing (Goldstein 1989:629). This form of compromise represented less of a threat to the Government of Tibet whilst the Kuomintang had control of China, but the superior military power of communist China meant that whilst Tibet's status remained *de facto*, the threat of occupation was high. The continued semantic confusion concerning the term suzerainty remained critical, if somewhat divorced from precise legal consideration of the term. In 1948, the United States State Department sought to deal with the Republic of China regarding the Tibetan Trade Mission by stating that the U.S. had 'no intention of acting in a manner to call into question China's *de jure* sovereignty over Tibet,' but that China should 'appreciate that the fact that it exerts no *de facto* authority over Tibet is [the] root cause of [the] situation' (U.S. Department of State 1948:767). This choice of terms is clarified in a State Department report of 1949, which explains that whilst suzerainty appears to fit the case, it also 'carries the connotation of a vassal state and does not fit as well into customary American concepts as into British usage.' The report therefore concludes that 'it might be desirable to avoid a possible controversy over 'sovereignty' versus 'suzerainty' by referring in the future to Chinese *de jure* authority over Tibet or some similar comprehensive term' (U.S. Department of State 1949:1069).

The Tibetan government found no support for its application to join the United Nations. The British position, which the U.S. followed, was that admission was impossible due to the operation of the veto in the Security Council. Further, the British felt it inappropriate to intervene 'since Tibet is of importance only in relation to the security of India and any assistance to Tibet should be limited to supporting Indian policy in Tibet' (FO371/84465). There was considerable anxiety that substantive aid to Tibet, or visible support at the U.N., would encourage communist propaganda against imperialism. Related to this was the Foreign Office's reluctance to provide military aid in such an inaccessible territory, for 'a Tibetan collapse would have a more serious effect on morale in neighbouring countries if the issue had been played up in advance' (FO371/84469 ).

As for India, Nehru's response was that any suggestion that India could act as a guarantor to a Sino-Tibetan agreement was 'not acceptable in this day and age.' He denied any separate Anglo-Tibetan Declaration entirely, stating that 'there is no

separate treaty like this' and upbraided the Tibetan delegation because 'when you had the time and opportunity to do something [about independence] you did nothing and that was a mistake' (FO371/84469). Nehru's position was factually incorrect, for British Government archives show that an Anglo-Tibetan agreement existed (IOR/L/PS/10/433 and Mss Eur F80/202). It is also contradictory because in 1947 the Government of India sent a telegram to the Foreign Office of the Tibetan Government requesting that the Tibetan Government adhere to existing agreements, stating that: 'This is the procedure adopted by all other countries with which India has inherited treaty relations from His Majesty's Government' (Ministry of Foreign Affairs 1959:39). The contradictions in Nehru's policy suggest a desire to retain all of the benefits of British relations with Tibet, without the inconvenience of reciprocity.

A decade later, Nehru stated of Tibet that 'at no time did any country, any foreign country, consider it independent' (Yang 1987:416). That this marked a distinct turnaround is apparent in a speech made on 22<sup>nd</sup> March 1949, in which Nehru discussed Tibet as a distinct entity, separate from China. 'Our relations with Afghanistan' he observed comparatively, 'are exceedingly friendly and our relations with Tibet, Nepal and all the neighbouring countries are also very friendly' (Nehru 1984:465). It is inconceivable that Nehru would have phrased his speech in such a manner had he considered Tibet to be a province of China. Nor, does it seem reasonable that India would have maintained the British Indian Mission in Lhasa as the Indian Mission for Tibet as it did after independence.

In 1954, India recognised Tibet to be a region of China in the Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between the Tibet Region of China and India. The British Foreign Office voiced private objection to India's announcement that the agreement does not 'depart from the view of the U.K. Government before 1947' affirming that Britain only recognised Chinese suzerainty, but this objection was not made public (FO 371/110647). The treaty secured traditional trade privileges for India in Tibet in return for the withdrawal of Indian military escorts and loss of extra territorial rights. Nehru's policy in 1954 was underpinned by a commitment to anti-imperialism, the renouncing of British rights in Tibet being an affirmation of this. Nonetheless, Nehru proceeded in the belief that the McMahon line which demarcated the Indo-Tibetan border would

remain in force. On this basis, Nehru announced the 1954 Panch Shila or 'Five Principles of Peaceful Co-Existence' a Sino-Indian accord presented domestically as a mark of India's success as a new world leader. The situation in China, however, was a different story, with Chinese publications issuing irredentist maps that lay claim not only to Indian territories, but also Nepal and Bhutan. By 1959, China breached the Indian border and declared the 1914 Simla Convention to be an 'unequal treaty' (Addy 1996:45). Accordingly, China refused to recognise the validity of the McMahon line, precipitating the Sino-Indian War of 1962.

## **6.6 The Tibetan Appeals to the U.N.**

In August 1950, negotiations began between Tibet and China in New Delhi to settle the question of Tibet's status, with Tibet claiming independence and China asserting that Tibet must acknowledge that it was part of China. Whilst negotiations were still in progress, the PLA invaded Tibet in October of 1950, destroying the main Tibetan defence force and taking control of Khamdo. The Tibetan Government claimed this was an illegal use of force undertaken whilst peaceful negotiations were in progress. The Chinese ambassador in Delhi responded that the Tibetan Government had been given ample time to respond to Chinese demands and 'should bear the responsibility for all consequences' (Goldstein 1989:699). These events prompted Tibet's first appeal to the U.N., citing recent U.N. resolutions regarding Korea as a precedent for international assistance. This first appeal was rejected because it had been telegraphed from Kalimpong (Sikkim) which was outside of Tibetan territory. The subject was not considered until El Salvador requested the issue be raised before the General Assembly under Article 1, proposing in its draft resolution that a committee be established to study 'appropriate measures that could be taken by the General Assembly' (Goldstein 1989:714). The issue was subsequently brought before the General Committee for a preliminary decision on whether the matter should be considered, prompting considerable private consideration of Tibet's legal status by India, Britain and the United States.

One of the first issues considered by the British Foreign Office was whether a Tibetan appeal was applicable under Article 35 (2) of the Charter. The conclusion reached was that 'since 1913 Tibet has not only enjoyed full control over her internal

affairs but also has maintained direct relations with other states. She must therefore be regarded as a state to which Article 35(2) of the Charter applies' (FO371/84454).<sup>67</sup>

The key document referred to in support was the Simla Convention of 1914. Several points were stressed. Firstly, Tibet participated in the tripartite conference in her own right and that 'whilst the Chinese Government subsequently repudiated the initialling of the Convention by their representative...on occasion they have stated that they accept the terms of the Convention apart from the clauses fixing the boundary between China and Tibet' (FO371/84454 ). Furthermore, if 'China repudiated the Convention in its entirety, as her present actions clearly show she has done, she has no right whatever over Tibet, not even to a nominal suzerainty' (FO371/84454). Secondly, the Foreign Office distinguished between Tibet, which enjoyed the right to engage in foreign relations, and British protected states with internal autonomy that did not. Thirdly, recognition of Chinese suzerainty since 1914 'was conditional on recognition by China of Tibetan autonomy; in other words the suzerainty which we recognised was of the nominal kind' and 'accepted the right of Tibet to enter into direct relations with other states.' Having made this analysis, the Foreign Office pointed out that the government had previously committed itself to the position that Tibet possessed international legal personality in 1943. This refers to an official communication sent by the foreign secretary, Anthony Eden, to the Chinese foreign minister, Dr. Soong, which stated that Tibet had 'enjoyed de facto independence' since 1911 (FO371/93001).<sup>68</sup>

Additional examination of Tibet's vassal status raised the following points. Firstly, that the precise status of a vassal in relation to its suzerain lacked clear definition and needed to be examined on an individual basis. Secondly, that it was necessary to determine if all international treaties entered into by the suzerain state ipso facto applied to the vassal, and also whether the vassal was ipso facto at war if the suzerain was at war. Having examined the evidence on these points, the Foreign Office

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<sup>67</sup> Article 35 (2). A State which is not a Member of the United Nations may bring to the assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

<sup>68</sup> The document highlights how the term autonomy was used by the British to signify Tibet's relative independence as a vassal (in comparison with, for example, the Native States), thus implying Tibetan legal personality. In the process of affirming British policy to deal with Tibet separately from China, the document states that the British Government recognised 'the status of Tibet as an autonomous State under the suzerainty of China, and intended dealing on this basis with Tibet in the future.'

concluded that Tibet had a clear international identity (FO371/84454). The course of action envisaged in its communication to the British delegation at the U.N. was that the matter would be brought before the Security Council and a condemnation of Chinese aggression be made. There was anxiety about avoiding a more explicit resolution regarding withdrawal which could not be enforced, the result of which would be that 'the United Nations would lose prestige' (FO371/84454). An additional caveat was that Britain should 'recognise that initiative must lie' with India (FO371/84454).

These anxieties were amplified by the British delegation to the U.N., who observed that the Government of India had doubts about supporting Tibetan independence and that if brought before the Security Council 'there might be strong pressure brought on us to support some far reaching resolution (FO371/84454)'. The delegation therefore considered it best 'to argue to the general effect that the legal situation is extremely obscure and that in any case Tibet cannot be considered as a fully independent country' (FO371/84454 ). The British Delegation to the U.N. persisted in this argument, despite the Foreign Office repeatedly and unequivocally asserting that Tibet had independent legal status. With the U.N. debate imminent, and no resolution between the departments forthcoming, the British Delegation to the U.N. insisted that it would not proceed on the basis of the Foreign Office's legal opinion without a formal written ruling from the British Attorney General (Goldstein 1989:718).

The delegation's position was maintained by the British representative on the 24<sup>th</sup> November 1950, when the General Committee debated whether 'the invasion of Tibet by foreign forces' should be put before the General Assembly. The representative argued as a matter of procedure the issue would be best served by postponement in the hope of an amicable agreement. He then stated that 'the Committee did not know exactly what was happening in Tibet nor was the legal position of the country very clear.' The Indian representative expressed a similar sentiment, asserting falsely that 'Chinese forces had ceased to advance' and the 'Indian Government was certain that the Tibet Question could still be settled by peaceful means' (FO 371/84454). These arguments held sway and the Tibetan appeal was tabled. The impact of the adjournment was profound. It led directly to the Tibetan Government entering into negotiations with the Government of China, resulting in the

Seventeen Point Agreement.<sup>69</sup> This agreement formed the legal basis for Tibet's incorporation into the PRC.

Yet, the reason neither Britain nor India supported the appeal had little to do with concerns over legal obscurity. Nor did it flow from the certainty that a peaceful settlement was imminent. The Tibetan Government had made it clear to both the British and Indian Governments that it intended to press on with the appeal rather than negotiate and India, despite what it said at the U.N., had expressed clear doubt that negotiations were viable (FO 371/84454). Instead, the position reflected the pressures of policy, and this was why the British delegation to the U.N. sought to inject uncertainty into the legal opinion. An internal letter sent by Sir Gladwyn Jebb, the British Ambassador to the U.N., sums up this attitude:-

‘if there is any doubt at all as to the validity of the legal argument that Tibet is an ‘independent State,’ we might take profit from such dubiety by failing to argue the legal case in detail and generally maintaining that the legal situation is obscure...Politically, I have no doubt at all that what we want to do is to create a situation which does not oblige us in practice to do anything about the Communist invasion of Tibet’ (FO 371/84454, 15th November 1950).

As noted above, this political stance conflicted with legal analysis, the legal argument that Tibet should be regarded a state being made with great clarity by Sir Eric Beckett of the Foreign Office. When the British Delegation to the U.N. sought written confirmation from the Attorney-General, it created a delay. It was this delay that enabled the British representative to state that the legal status of Tibet remained unclear.

The primary documents suggest that this delay was a calculated manoeuvre to further the political aims expressed by Sir Gladwyn. There is no evidence of genuine doubt over-Tibet's status within the department, only a clearly stated disagreement on appropriate policy. In this regard, the British delegation to the U.N. displayed a similar attitude to that of India, of which Beckett reported:-

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<sup>69</sup> The issue was brought before the General Assembly by El Salvador.

‘I would say that it appears to me more probable that India is rather more perplexed as to what she should do than doubtful about the legal position...I get an impression rather of legal opinion being directed to fit policy rather than the reverse’ (FO 371/84454).

Only four days before the General Committee debate on Tibet took place at the U.N., Beckett reasserted his opinion that the legal position was clear, arguing that ‘a reference to the Attorney General is likely not to perpetuate the obscurity of the legal situation, on which New York seem to be keen, but to dispel it if it exists’ (LO2/566). Despite his misgivings, Beckett was persuaded by the New York office to consult with the Attorney General orally, and he recorded that an appointment had been made for 22<sup>nd</sup> November.

Interestingly, handwritten notes made by the Attorney General, Sir Hartley Shawcross, show that he concurred with Sir Beckett’s opinion. Replying to a letter from New York which states:-

‘There is a slight misunderstanding on the question of Tibet on which I believe you have been asked to advise.

We had here an opinion to the general effect that Tibet was to be regarded as an independent State. It was not clear whether this was your opinion or Beckett’s...’

Shawcross responded:-

‘No: I have not been asked to advise formally, but the papers which deal in the core of this Foreign Office view seemed correct. I therefore said that unless I was told on what view this position we had hitherto taken up was challenged I saw no reason to disagree’ (LO2/566).

This was Shawcross’ written position on 4<sup>th</sup> December 1950, one week after the appeal at the United Nations had occurred. It is highly likely, therefore, that this had also been his position on the 24<sup>th</sup> November when the U.N. debate took place. Indeed, it is probable that when he writes, ‘I therefore said that unless I was told on what view this position we had hitherto taken up was challenged I saw no reason to

disagree,' that he was referring to what had been said in the meeting with Beckett on the 22<sup>nd</sup> November. Due to pressure of time, the referral to the Attorney General did not move beyond the informal level. This suited the purposes of the delegation in New York, for it gave the British representative at the U.N. enough leeway to remain uncommitted.

The correspondence highlights that the difference in opinion was political in nature, and suggests that political influence was brought to bear on the legal advisors. This diplomatic pressure is evident in notes made by the Solicitor General Baron Frank Soskine, an acting Member of Parliament at the time. In a handwritten note to the Attorney General, shortly after the Tibetan appeal to the U.N. had been adjourned, Soskine suggested that Shawcross might like to look at the paperwork once more in order to 'form a considered view.' However, earlier in his note he indicates that the Attorney General had already given a considered view, although apparently one that might cause political difficulty. 'For the time being the Tibet issue has gone to sleep,' he writes:-

'If the matter does revive it would be politically very awkward if we had to treat Tibet as an independent. My view on the information I had was the same as yours...but in view of the importance of the question, if as I gather you have not finally committed yourself, we might write to the F.O saying that your view is not intended to be final' (LO2/566).

The correspondence with the Attorney General is significant for several reasons. Firstly, the particular file that contains these documents was classified under the 50 year rule rather than the standard 30 year rule. Owing to the fact that it was therefore released long after all other British government files on the subject, this has meant that the correspondence has not been analysed in the key secondary texts.

Secondly, this is of significance because previous studies have given the impression that Tibet's legal status was held to be more uncertain than it in fact was. That there was a disagreement between the British U.N. Delegation and the Foreign Office was evident in previously released documents, but the new material removes uncertainty about the nature of that disagreement. For example, Goldstein in his authoritative survey states that the British Ambassador to the U.N., Sir Jebb, 'argued



that the Indians themselves had doubts about Tibet's status as a state and that Britain should therefore modify its views on the matter' (Goldstein 1989:718). However, it is suggested that the source material indicates there was no significant doubt about the legal position on either the Indian or the British side. Placed in the context of other correspondence, it is necessary to consider that Sir Jebb was attempting to influence the outcome of the legal analysis for political reasons.

A second Tibetan appeal proposing a U.N. fact finding mission to Tibet was prepared immediately by the Tibetan Government. As with the first appeal, the British Foreign Office was supportive, but the British High Commission in India and the British U.N. delegation were not. The High Commissioner was anxious to support the Indian view and felt that encouragement of Tibet's appeal would be regarded 'as further evidence of British interference' (FO371/84455). The British U.N. delegation felt that 'in view of other issues now under discussion in the United Nations, we do not consider that time is opportune for raising question of the Tibetan appeal, nor, if it were, should we be willing to take the initiative ourselves in view of the Government of India's more immediate interest and responsibility in the matter' (FO 371/93002). The 'other issues' were the ongoing U.N. involvement in Korea, a situation cited by the Government of India as a reason not to involve itself in Tibet. Linked to this was Nehru's statement that 'if either the United Kingdom or the U.S. sponsored it, the Chinese would inevitably talk of Anglo-American imperialist influence...even if India sponsored it the same accusation might be made' (FO 371/84454). Beyond this lay the issue of India's aggressive occupation of the Indian princely state of Hyderabad in September 1948, with the Indian external ministry expressing concern that involvement in Tibet would incite pro-Chinese nations to 'drag out [the] old skeleton of Hyderabad' (U.S. Department of State 1950:546). The issue of Hyderabad had first been placed before the Security Council in 1948 and remained on the agenda in 1950 without any resolution (Engleton.1950:279). Indian anxiety reflected similar concerns within the British Foreign Office, but in relation to Tibet's status remained ambiguous:-

'The United Kingdom has many protected States enjoying internal autonomy but whose foreign relations are entirely conducted by H.M.G. We certainly wish to maintain the position that questions between the U.K. and these States (and indeed all colonial conflict) are domestic matters in which

the U.N. has no rights under the charter to interfere. If we adopt a sort of half-way house position we may be creating precedent which can be used against us in the future' (FO 371/84454).

These events surrounding Tibet's appeal to the U.N. highlight several significant factors. Firstly, although the proposal by El Salvador prompted the most thorough evaluation of Tibet's legal status to date, consideration of its status was overshadowed by other affairs. Secondly, a primary concern was that a resolution would raise the issue of enforcement under Chapter VII. Thirdly, in connection with a perceived inability to enforce a resolution, there was anxiety about any 'loss of prestige' for the U.N. Finally, there was anxiety about complications in connection with the issue of colonialism, including Western involvement in matters devolved to India, and continuing British relations with its protectorates. Likewise, in the case of India, there was concern that its outward independence and resistance against imperialism be maintained, yet its military occupation of the legally independent state of Hyderabad ('in area, population and financial strength...larger than many Members of the United Nations' (Eagleton 1950:302)) be treated as a matter of internal security.

## **6.7 The Seventeen Point Agreement and Tibet's Changing Status in the Postcolonial World**

The second Tibetan appeal did not reach committee stage, for following further advancement by the PLA and in light of diplomatic obstacles, the Tibetan Government began direct negotiations with Beijing. The result of this, given Lhasa's inability to defend itself against the PLA troops, was the Seventeen Point Agreement, handed over sovereignty to China with provisions for Tibetan regional autonomy. The status of Tibet, much like Hyderabad, was therefore left unresolved. Given the Security Council had been willing to consider the case of Indonesia, then under the jurisdiction of the Netherlands, it is clear that there was a precedent for considering the Tibetan appeal even if the full extent of its international personality was unclear. This was in fact a point raised by the U.S. Ambassador to India at the time of Tibet's second appeal: 'Is it logical for the U.N., which gave Indonesia which was under Dutch sovereignty hearing, to ignore Tibet? Will India, for example, have greater respect for the U.N. if mainly out of deference to it, the U.N. gives Tibet no

opportunity to present its case' (U.S. Department of State 1950:612). This comment underlines the significant position that India occupied.

Its position is significant, not simply because the United States and Britain were anxious to defer to India's postcolonial status, but because the Indian government's policy involved a consolidation of normative values regarding modernisation and development that mark the final erasure of the Tibetan state. The politics of Nehru, who expressed considerable impatience with Tibetan viewpoints on modernisation, reflect this dynamic. As far back as 1926, Nehru had established the League Against Imperialism in cooperation with representatives of the Kuomintang, Java, Indo-China, Palestine, Syria, Egypt, Arabs from North Africa and with members and patrons such as Einstein and a Nobel Laureate of Literature, Romain Rolland (Nehru.1942:162-163). In 1927, Nehru issued a joint statement with the Chinese delegation at the Brussels Congress of Oppressed Nationalities which declared: 'British Imperialism, which in the past has kept us apart and done so much injury, is now the very force that is uniting us in a common endeavour to overthrow it' (Addy.1994:38). It is easy to see, therefore, that Nehru positioned himself as part of the international vanguard and from this vantage, the Tibetan insistence on maintaining an unindustrialised state, with minimal administrative organs, seemed irrelevant for the modern postcolonial age. Indeed, he told the British Commissioner in 1959 that India's interest in Tibet was 'historical, sentimental, and religious and not essentially political' (FO371/141593).<sup>70</sup> As the historian Goldstein puts it, 'Tibet looked modernity straight in the eyes and rejected change and adaptation. Its leaders saw Tibet's greatness in its religious institutions and held strongly that these should be continued without competition or contamination from 'modern' institutions such as public schools or a professional army' (Goldstein 2007:1). In 1951, institutions associated with the modern state administration were largely absent. Tibet had no print capitalism, no cash economy, no meaningful military, was unindustrialised and had no infrastructure. There were few schools, no public health system and no banks. The government bureaucracy was small, as were the costs of administration. State intervention into the lives of the citizens was minimal, confined to administering the tax obligations of the aristocracy and peasantry. The primary purpose of this tax was to maintain the

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<sup>70</sup> In a similar vein, Nehru told the British High Commissioner that 'he felt great sympathy for the Tibetans, but they were rather difficult to help, for they were so ignorant of the modern world and its ways' (FO371/141593).

monasteries by providing food and welfare resources to the 10-20% of the population under monastic training.<sup>71</sup>

For Nehru, the role of the state was very different to that proposed by Tibetan political thought:-

‘It can hardly be challenged that, in the context of the modern world, no country can be politically and economically independent even within the framework of international interdependence, unless it is highly industrialised and has developed its power resources to the utmost. Nor can it achieve or maintain high standards of living and liquidate poverty without the aid of modern technology in almost every sphere of life. An industrially backward country will continually upset the world’s equilibrium and encourage the aggressive tendencies of more developed countries’ (Nehru 1946:144).

This is, therefore, an affirmation that peace is a matter of material development and Nehru’s pragmatic, materialistic vision accords well with the type of peace and stability promoted by international human rights law, particularly with regard to second generation rights. There is a tacit acceptance that the state cannot be based upon a theory of non-violence; on the contrary, violence may be necessary to secure basic rights.<sup>72</sup> As observed by Rajagopal, this sense of legitimate violence is embodied in human rights discourse, so that for example, ‘the mass deportation of 1.5 million people from Phnom Penh by the Khmer Rouge in 1975 is argued to be a crime against humanity, while the mass eviction/deportation of 33 million development refugees from their homes due to development projects such as dams, by the Indian Government, is simply seen as the ‘social cost’ (if at all) of ‘development’ (Rajagopal 2003:195).

Nehru’s political thought anticipated this, correlating state existence with development, industrialisation being the essential measure of equality and civilisation in the postcolonial world, marking the arrival of modernity. This is, perhaps, best

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<sup>71</sup> Tax in the form of *corvée* labour also ensured the running of the national post, communities being under obligation to provide transport and labour along the route (Goldstein 2007:1-16).

<sup>72</sup> See Rajagopal (2003:195) for a more nuanced discussion of the link between human rights, development and state violence. For Nehru’s acceptance of the necessity of violence, see Nehru (1942:Ch 63) ‘Conversion or Compulsion’.

summed up by Nehru's' opinion on Ghandi, a figure who was, and remains, of supreme influence to the Tibetan Government both before and after exile:<sup>73</sup>

‘the old ways of thought and custom and religion had become alien to us. We called ourselves moderns, and thought in terms of ‘progress,’ and industrialisation and a higher standard of living, and collectivisation. We considered the peasant’s viewpoint reactionary...vaguely we had hoped Gandhiji...would advance along the line that seemed to us to be right’ (Nehru 1942:254-255).

Writing about comparable comments made by Nehru elsewhere, Chatterjee concludes:-

‘The critical point of Ghandhism’s ideological interventions was now pushed back into the zone of the ‘purely religious’ or the metaphysical; only its political consequences were ‘real,’ and having been ‘retrieved from the irrational trappings of its ‘language,’ the possibilities were endless: it could justify everything that was progress’ (Chatterjee 1986:154).

There is a comparable dynamic evident in Mao’s policy for assimilating Tibet into China. From the outset, Mao acknowledged that because of linguistic, social and cultural differences, the incorporation of Tibet required a different strategy to that of other areas classified as belonging to minority nationalities such as Inner Mongolia and Sikiang. These presented less difficulty, in part because a larger Han population existed in these areas, and also because Mao recognised that, ‘Although the population of Tibet is not large, its international position is extremely important’ (Goldstein 2007:23). As late as 1957, Mao was reiterating the uniqueness of Tibet’s position amongst the minority nationalities in his speech on the ‘correct handling of contradictions among the people,’ in which he denounced ‘Great Han Chauvinism’.

With regard to Tibet, Mao announced the postponement of democratic reform ‘because conditions are not yet ripe’ and called for patience as ‘According to the Seventeen Point Agreement between the Central People’s Government and the Local Government of Tibet, reform of the social system must eventually be carried out’

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<sup>73</sup> The influence of Ghandi was discussed with Ven.Samdong Rinpoche, the Prime Minister of the Tibetan Government-in-Exile, in an interview with the author in July, 2002.

(Ginsburgs and Mathos 1959:259). Tibet was the only region to be incorporated into the PRC by such a written agreement, and it established the basis for wide ranging social and economic development. In comparison with the mainland, however, this reform was, in the first half of the 1950's, considerably less far reaching. The Tibetan legal system continued to function, for example, whilst in China following the repeal of all legal codes from the Republic of China, the PRC's legal system was largely dismantled.<sup>74</sup> The land reform movement on the mainland, in which private property was confiscated and redistributed by the state according to the Agrarian Reform Law (1950), was similarly delayed in Tibet.<sup>75</sup>

The Seventeen Point Agreement brought to an end Tibet's appeal at the U.N., and effectively marks an end to the issue of Tibet's legal status in international law, with the next considerations of the General Assembly in 1959, 1961 and 1965 being confined to the issue of human rights.<sup>76</sup> The issue came before the U.N. at that time following the breakdown of the Seventeen Point Agreement. This resulted from an increasing compulsion on the part of the Central Government for reform in Tibet, with Eastern Tibet in particular being forcibly reformed through such means as the destruction of monasteries. This led to a mass Tibetan uprising against the Chinese and the voluntary exile of the Tibetan Government and numerous civilians (Shakya 1999:Ch 5; Norbu 1979; Shwartz 1994). The Legal Inquiry Committee on Tibet, convened by the International Commission of Jurists, presented detailed evidence to the U.N. in 1959 and 1960 and found 'that Tibet was at the very least a *de facto* independent state when the Agreement on Peaceful Measures in Tibet was signed by the Tibetan Government in 1951 and the repudiation of this agreement by the Tibetan Government in 1959 was found to be fully justified' (International Committee of Jurists 1960:5). On this basis, the committee took the view that the agreement was a treaty. The Tibetan Government's unilateral termination of the agreement on the grounds of violation by the PRC was held to have effected the resumption of Tibet's independent status, so that there was 'no obstacle in the Charter of the United Nations

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74 The 1949 Common Programme, a provisional constitution, put in place 148 regulations dealing with marriage, land reform, corruption and the destruction of 'class enemies,' but with a mass purging of existing Kuomintang judiciary few formal cases were brought to court.

75 See Shakya (1999: Ch 4 and 5) for a detailed analysis of how reform was implemented and resisted in Tibet between 1951 and 1959, including the events leading up to the Khampa revolt.

76 U.N. General Assembly Resolution 1353 (XIV), 1959. U.N. General Assembly Resolution 1723 (XVI), 1961. U.N. General Assembly Resolution 2079 (XX), 1965.

to the matter being raised before and decided by organs of that body' (International Committee of Jurists 1960:5). However, the Seventeen Point Agreement's status as a treaty remained unresolved, with the PRC maintaining the agreement to be an internal constitutional matter.

Leaving aside the question of the legality of the Agreement, it is clear that the successful assimilation of Tibet was seen to rest on the effective development and modernisation of the country. The Agreement as a whole is framed, in the preamble, as part of a wider effort to expel domestic and foreign imperialism 'in order that the Tibetan nationality and people might be freed and return to the big family of the Peoples Republic of China to enjoy the same rights of national equality as all other nationalities in the country and develop their political, economic, cultural and educational work.'<sup>77</sup> This sentiment was affirmed in Article 1, which stipulated that 'The Tibetan people shall unite and drive out imperialist aggressor forces' and 'return to the big family of the Motherland.' With the overall sovereignty of China established, and the position of the PLA affirmed (Article 2), the provision for 'the right of national regional autonomy under the leadership of the Central People's Government' was dealt with in Article 3. This was in accordance with the policy towards nationalities laid down in the Common Programme (1949). Articles 4, 5, 6, and 7 further defined the scope of autonomy, specifying that the Central Government would 'make no change to the existing political system in Tibet' nor alter the 'established status, functions and powers of the Dalai Lama and that officials of various rank shall hold office as usual' (Article 4). Specific provisions were also made with regard to the status and function of the Panchen Lama (Article 5 and 6). Additionally, Article 7 detailed 'The policy of freedom of religious belief laid down in the Common Programme' and that 'the religious beliefs, customs and habits of the Tibetan People shall be respected, and lama monasteries shall be protected. The central authorities shall not effect a change in the income of the monasteries and temples.'

This protection of traditional institutions and religious rights was, however, from the outset potentially in conflict with the policy on development outlined in Article 9 and 10. It was these articles as much as articles governing the entry of the

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<sup>75</sup> The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, 23 May 1951: Preamble.

PLA (Article 2 and 13) and the construction of military and administrative headquarters (Article 15 and 16) which established the basis for Tibet's integration. Article 9 provided for development of the spoken and written language and for school education. Article 10 stipulated development of 'agriculture, livestock raising, industry and commerce, step by step, and improvement of people's livelihood.' Both of these policies came with the proviso that development would occur 'in accordance with the actual conditions in Tibet'. There was, however, an assumption that the masses would support development and that a wide scale dismantling of the old social system would occur organically as a direct result. This was something anticipated by Article 11, which held that there would be 'no compulsion on the part of the central government for the local government of Tibet to carry out reforms' but that reform would be settled when 'requested by the people.'

Fundamentally, the position adopted by Mao was in accordance with Marxist historical materialist theory, assuming 'a progressive development of human society towards greater union and the eventual overcoming of cultural, racial and linguistic barriers' (Perry 1994:62). The concessions made for minority nationalities in this context were, therefore, an indication of backwardness rather than an appreciation of the value of their difference. By 1959, when the Seventeen Point Agreement broke down, the primary point of conflict was the impossibility of the central government reconciling the policy of development it envisaged in Article 9 and 10 with the continued existence of religion as protected under Article 7. The breakdown is particularly evident with regard to conceptions of productive labour and resource management; within the context of the central government's development plan, religion was not simply ideologically incompatible with communist thought, it was economically unproductive. The centrality of this issue is evident in articles published by the Chinese Communist Party in Tibetan language papers in Eastern Tibet in 1958 which condemned monasteries as reactionaries under religious guise and stated that 'the economic and cultural backwardness and sparse population (of Tibet) was due to the poisonous effect of religion' (International Commission of Jurists. 1960:19-20). As concluded in the International Commission of Jurists Report, between 1951 and 1959:-

'the overall picture is one of increased production, improved communications, the building of houses, hospitals and power stations, the abolition of feudal incidents and a general drive towards materialistic



progress. The basic question is for whom and for what, and the account of living conditions in Tibet indicates that the material progress in Tibet is being absorbed by the Chinese, even at the cost of the previous living standards of ordinary Tibetans. Moreover, the price paid for the development of Tibet had included genocide against the Buddhist religious group, and also the large scale violation of the most basic of human rights' (International Commission of Jurists 1960:117).

It was noted earlier that McKay, in his research of British diplomatic archives, concluded that in the period following the Younghusband invasion of Lhasa, 'there was no dispute between the two powers [Britain and the Republic of China] over the ideological model which Lhasa should follow for China was herself modernising on the Western model. The point was who would control the process' (McKay1997:15). The Seventeen Point Agreement effectively brought this debate to a close, for despite an ideological split between the West and China on the issue of socialism, the commitment to state centred modernisation remained central to both. The occupation of Tibet by the PRC did not in itself resolve the issue of Tibet's status, so in that regard there was no legal closure in 1951. The PRC, from 1951 onwards, has maintained the position that the Seventeen Point Agreement was an internal arrangement, not a matter of international law. It is not therefore attributed with conferring legality through cession: its primary function was to stall debate on Tibet's legal status at the U.N. Adding to this impression, the Agreement remains unpublished by the Secretariat of the U.N., although this reflects the fact that the PRC was not a member of the U.N. in 1951, and therefore not subject to Article 102 of the Charter, as much as it reflects the legal and political controversy over status.

The effect of the Seventeen Point Agreement being widely treated as a domestic matter is that it returns the issue back to the consideration of the Simla Convention. The Simla Convention therefore remains key, being a recognised international treaty insofar as it was published by Britain and relied upon by India for the establishment of the Indian border, particularly within the context of the Indo-China War of 1962. It does, however, present a contradictory representation of Tibet as an entity straddling the colonial and postcolonial worlds, with the capacity to enter into treaties, but without regional equality. The argument of the PRC that the Simla Treaty was an unequal treaty and void in international law therefore finds some logic, reflecting a general shift from the hierarchies of the nineteenth century to the state-

based system visualised at the San Francisco Conference. It also deemphasises the contradictions of postcoloniality, pushing back the conflicts that emerge within the state centred development model of the Charter-based system of rights protection. Indeed, the Seventeen Point Agreement reflects well the modern ideal of affording special rights to minorities. In this, the significance of the split from the imperial-positivist era, associated with an absolutist conception of sovereignty, and the more fragmented concept of capacities, rights and obligations that emerged at the end of the twentieth century, is shown to be something more than a rejection of unrealistic formalism in favour of pragmatism. It seals the legitimacy of established nation-states, not just territorially, but ideologically, by creating an illusion that transnational engagement in justice at the level of broad rights groups within civil society will resolve the dilemma that etatization poses to local subjects (Convention on the Elimination of All Forms of Racial Discrimination (1969), Convention on the Elimination of All Forms of Discrimination Against Women (1981), Convention on the Rights of the Child (1989), Declaration on Fundamental Principles and Rights at Work (1998)).

The disaggregation of sovereignty in the second half of the twentieth century, with its blurring of the boundaries between public and private and the creation of hard and soft law, therefore constructs its own peripheries which act to exclude what was, in the case of Tibet at least, more visible in an era renowned for inequality and exclusion.

To revisit the arguments made in the first half of this chapter, the analysis of Crawford's discussion of Tibet prior to 1951 as an example of an autonomous region illustrates, particularly when compared to the separate discussion of vassal states, the effect of legal discourse's imperative to construct continuity and coherency. Part of this dynamic, visible in his discussion of the vassal states of British India, involves the suppression of colonialism from what is the 'legitimate' historical narrative of modern legal rationality. It is also indicative of a wider temporal displacement, in which the progressive ethos of modern international law is presented as universally aspirational and founded in practice, yet still largely autonomous from the particularity of historical location and political will.

Nonetheless, the history of the second half of the twentieth century provides ample evidence to conclude, as Nathaniel Berman does, that ‘the end of empire has merely revealed most states to be imperial’ (Berman 1988:255). This presents a disjuncture between the progressivist narrative of international law’s evolution from colonialism, and the normative foundations of the modern nation-state which assert ‘the isomorphism of people, territory and legitimate sovereignty’ (Appadurai 1996:191). The question then becomes whether the suppression of colonialism in the narrative of international law is genuinely progressive, or whether it really masks undercurrents of violence and exploitation embedded within the state structure itself. A key point here is made by Appadurai in his discussion on the production of locality, and that is that ‘there do not seem to be any very reliable links between state ideologies of welfare, market, economics, military power, and ethnic purity ... [yet]...they appear to pose a rather similar set of challenges to the production of neighbourhood by local subjects’ (Appadurai 1996:190). Despite apparent disparity in debates upon the ideal mode of state governance across the political spectrum, and despite international law’s general insistence that the resolution of such debate is, within bounds, a matter internal to states, is there a normative template for state development impelled by the overarching value system of modernity, which constrains local difference? Appadurai’s work upon the production of locality suggests this to be the case, even if the increased circulation of people, and transnational formations of locality, such as diaspora or virtual networks, threaten the stability of the nation-state: ‘From the point of view of modern nationalism, neighbourhoods exist principally to incubate and reproduce compliant national citizens –and not for the production of local subjects. Locality for the modern nation-state is either a site of nationally appropriated nostalgias, celebrations and commemorations or a necessary condition of the production of nationals’ (Appadurai 1996:191). For Appadurai, then, local subjects, whilst still ‘in a position to generate contexts as they produce and reproduce their own neighbourhoods,’ are nonetheless ‘increasingly prisoners in the context producing activities of the nation-state which makes their efforts to produce locality seem feeble, even doomed’ (Appadurai.1996:186).

The argument here is that the ‘obscurity’ of Tibet’s legal status reveals something about the politics of knowledge and how the postcolonial is viewed within international law. The failure to assess the legal status of Tibet at the time the

Seventeen Point Agreement came into force does not explicitly reveal an imperialistic disregard for a non-western culture comparable to that found in the standard of civilisation. The British position, for example, was not impelled by any assessment of how civilised Tibet was, but by concerns about the prestige of the United Nations, enforcement, and the attitude of India. However, a standard of civilisation remains implicit; not so much in what was said at the time, but in what has not been said in subsequent years. It is reflected not so much in a debate about the civilised status of non-western cultures, but in the shared faith in development displayed by the Seventeen Point Agreement and human rights discourse, a faith which closes the debate on how different philosophies of development might emerge from societies such as Tibet, and what that might mean for how state, community and progress are regarded.

Generally, the relevance of Tibet to international law is presented as being about the implementation of rights in the PRC, as related to the Seventeen Point Agreement construction of autonomy, rather than any evaluation of Tibet's status as a sovereign state. Continued treatment of the Seventeen Point Agreement as a domestic document coincides with a general disciplinary distaste for discussion of Tibet's status, and a sense that a preoccupation with sovereign status is an irrelevance in a global environment of complex legal interactions between governmental and non-governmental organisations and an increasingly universal implementation of rights and development. The continual deferment of the question of Tibet's status away from a meaningful appraisal of the Seventeen Point Agreement and the events of 1951, back towards 1914, is related to this dynamic. Between these two documents, the space for any articulation of what Tibetan statehood may mean has been erased. This erasure is not simply about the lack of evaluation of statehood in the juridical sense; it also involves the stalling of any debate upon alternative philosophies of the state, a debate that perhaps cannot be had within contemporary disciplinary models of human rights. As Rajagopal discusses, 'While human rights discourse celebrates the retreat of the state, the realisation of human rights is predicated on the expansion of the state' (Rajagopal 2003:189) and that expansion is itself at odds with the minimal state system of Tibet. At issue, therefore, is how postcolonialism should be assessed. The Simla Treaty and the Seventeen Point Agreement present the limits not only of Tibetan statehood, but of how the state is thought about as a philosophically founded social

project. In relation to this, the historically deterministic approach of Crawford's analysis on Tibet's status, in which 'the Chinese view in 1951' affirmed that 'Tibet was not in 1914 regarded as independent' (Crawford 1979:210) is perhaps best assessed as a reflection of the contradictions involved in the postcolonial in international law; involving at once a pushing away of the imperialistic past and a reaffirmation of the continuity with which the present attains value. The erasure of Tibet from subsequent legal discourse is in this sense an example of the effect described by Bhaba, for whom:-

'the project of modernity is itself rendered so contradictory and unresolved through the insertion of the 'time-lag' in which colonial and postcolonial moments emerge as sign and history that I am sceptical of the transitions to postmodernity in the West which theorise the experience of the 'new historicity' through the appropriation of a 'Third World' metaphor' (Bhaba 1991:195).

The assessment of imperialism and its relationship with nineteenth century international law is essential to explaining the events of 1951, but it is, perhaps, only through a reassessment of the postcolonial that the absence of discussion of Tibet's status in international legal discourse can be explained. Rather than being a peripheral subject, its very marginalisation marks its significance by disrupting how difference and history are considered in the space of the present, and by raising questions about what the 'post' in postcolonial really means.

## Chapter Seven

As the plane descends, I am in low spirits, my mind is dazed,  
 Oxygen is supplied and medicine swiftly poured.  
 As I lie in bed, we speak first of the riots,  
 Sure enough, beyond the bowstrings, there are separate sounds.  
 Overtly opposing the government, instigating fury among the masses,  
 Secret plans in sinister rooms, moving forward their malicious intentions.  
 I lean on a stick to go up to [the building], we have detailed deliberations,  
 These violent people have themselves to blame for the bitter fruits.

Chen Kuiyuan, '*Return to Lhasa (28 May 1993)*',<sup>78</sup>

### 7:1 Introduction

In 2001, a PRC government White paper was published which argued that the modernisation of Tibet was an historical inevitability (Information Office of the State Council 2001). Leaving aside for a moment the question of the legality of the PRC takeover of Tibet, this chapter will focus upon the legal framework governing regional autonomy within which this process of modernisation has taken place. What inevitability means in this context, and its relationship to legitimacy, is key to understanding the nature of Tibetan autonomy within the PRC. It also locates PRC rule over Tibet within a wider narrative of modernity which, by utilising the evolutionary language of progress so beloved by Western imperialism, raises some interesting parallels and paradoxes. As the White paper puts it: 'Tibet's march toward modernization conforms to the world historical trend and the law of development of human society... from ignorance and backwardness to civilization and progress.' That this civilisation and progress has been achieved because 'the isolated, stagnant and declining old Tibetan society has been thoroughly smashed' is a mark of the ambivalence of autonomy, for despite the language of natural inevitability it is the violent intervention of the man-made state that is shown here as the impetus of change. This contradiction undercuts the narrative of progress and reveals the intrusion of state

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<sup>78</sup> This poem, written whilst Chen was acting as the Regional Part Secretary to the TAR, was published as part of a collection in *Lantian baixue* ('Blue Sky, White Snow'), Beijing Chubanshe, Beijing, 1999. The translation was provided by the Tibetan Information Network (TIN Doc 33(sd)).

mechanisms to shape and define the legitimate features of ‘traditional’ minority culture for modern times. Hence the White paper asserts:-

Tibet's ethnic characteristics and the fine aspects of its traditional culture have won full respect and protection under the regional ethnic autonomy system; with the progress of the modernization drive, they have been imbued with the current contents that reflect the people's new life and the new requirements of social progress, and have thus been carried forward in a process of scientific inheritance.

A slightly different perspective on inevitability is offered by the poem that prefaces this chapter. The poem was written by the Han Chinese official Chen Kuiyuan, who as the Regional Party Secretary in the Tibetan Autonomous Region occupied the highest position of authority in Tibet from 1992 to 2000. The inevitability alluded to by Chen is that of state reaction to ‘sinister’ and ‘malicious’ dissent. In the oxygen-starved space he describes, the government is the medicine and ‘these violent people’ have only ‘themselves to blame’ for the consequences of resisting treatment. As a self-conscious contribution to, and engagement with, ‘high’ culture Chen’s politically charged collection of poems undercuts the articulation of egalitarianism that ethnic autonomy seeks to maintain. It signifies the disjuncture between the state’s act of modernising and its gestures of minority right protection, where traditional cultures are continually translated into the language of the modern state. Change is inevitable, but its conformity to the normative values of modernisation is not. That will depend upon who controls the process of cultural translation between past and present, and for Tibet this is perhaps the true measure of genuine autonomy.

## **7:2      The Seventeen Point Agreement**

Tibet’s position was unique in that it was the only minority nationality region to be incorporated into the PRC by a legal agreement, the Seventeen Point Agreement of 1951.<sup>79</sup> The agreement remains a touchstone of PRC claims to legitimacy, often cited today as evidence of the central government’s commitment to peaceful reform

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<sup>79</sup> Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, 22 May 1951.

and its patience in dealing with a wayward local government.<sup>80</sup> This reflects the preamble, which stated:

In order that the influences of aggressive imperialist forces in Tibet might be successfully eliminated, the unification of the territory and sovereignty of the People's Republic of China accomplished, and national defence safeguarded; in order that the Tibetan ethnic group and people might be freed and return to the big family of the People's Republic of China to enjoy the same rights of national equality as all the other ethnic groups in the country and develop their political, economic, cultural and educational work, the Central People's Government, when it ordered the People's Liberation Army to march into Tibet, notified the local government of Tibet to send delegates to the central authorities to conduct talks for the conclusion of an agreement on measures for the peaceful liberation of Tibet.

The Agreement was the result of negotiations between the Tibetan and Chinese Governments following the defeat of Tibetan forces in Kham by the PLA. The Tibetan Government lacked the military capabilities to mount further resistance to any PLA advance to central Tibet, and so sent a delegation to Beijing to conduct peace talks. The delegates were not given full plenipotentiary powers and did not carry the official seals of the Tibetan Government, meaning that the Agreement was not formally ratified.<sup>81</sup> For this reason, the Tibetan Government-in-Exile has argued that the Agreement had no legal validity. The argument has also been made in secondary literature that the agreement was void because it was signed under the threat of force. This point is supported by Article 52 of the Vienna Convention which states that an agreement imposed by 'the threat or use of force' lacks validity. Certainly, the claims made by the Tibetan delegates that they were told to accept the terms offered or face the military invasion of Lhasa have weight given the fact that 40,000 PLA troops were already stationed in Kham. Nonetheless, as a point of law this particular argument on 'the effect of duress on treaties' is uncertain, the counter argument being that peace treaties, resulting as they do from acts of war, are by their very nature signed under duress (Legal Inquiry Committee on Tibet. 1960:164).

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<sup>80</sup> As the official PRC history of Tibet puts it, 'Such a lenient agreement signed between a militarily powerful Central Government and a local government that has been far from patriotic during negotiations is truly rare.' (Wang and Nyima 2001:214).

<sup>81</sup> The Agreement was signed and stamped by the delegates, but not with the official Tibetan Government Seal. (Tenzin Gyatso the 14th Dalai Lama. 1990:69).



In the specific case of Tibet such an argument, in order to be consistent, would have to be extended to other treaties which have been cited as evidence of Tibetan independence. Thus, the validity of the peace treaty between Tibet and Nepal in 1856 would be open to question. Likewise the 1904 Agreement between Great Britain and Tibet, which was clearly concluded under threat of force, would be void. The paradox therefore arises that if the Seventeen point plan is considered invalid under Article 52, so too would the treaties of 1856 and 1904. Yet, the treaties of 1856 and 1904 are cited by the Tibetan Government in Exile as evidence of Tibet's international legal personality.

This is in fact the position that the PRC takes towards the 1904 Lhasa Treaty, considering it void because it was signed under duress. As such the PRC position has been that the 1904 treaty was not legally binding. The definition of inequality applied by the PRC has generally led to a far more stringent test of validity than that provided for by the Vienna Convention. The PRC considers the 1904 treaty to be an unequal treaty due to political and economic factors also, as indeed it does all British-Tibetan treaties. This was one of the arguments that the PRC put forwards during the Sino-Indian boundary dispute that led to the Sino-Indian war of 1962. The PRC argued that the Simla Convention of 1914, which fixed the Indo-Tibetan border, was a product of imperialism imposed without consent and thus disputed India's right to succession of territory (Chen 1974:192). If these same stringent criteria on equality were to be applied to the Seventeen Point Agreement then it too would be considered an unequal treaty. Evidently the PRC has argued that the Seventeen Point Agreement is not an international treaty but an agreement between a central and local government; the preamble of the agreement is used to express this very point. Nonetheless, this represents a basic contradiction in how a valid agreement between two governments is concluded.

The Seventeen Point Agreement is a contradictory document in many ways. Its status as a treaty was unclear from the outset. As discussed in Chapter Six, the Tibetan Government undertook negotiations only after an appeal to the United Nations had been adjourned.

That discussion adds to the understanding of the Seventeen Point Agreement, for the international context in which the Seventeen Point Agreement came into being explains contradictions within the document. Despite the PRC's insistence that the Agreement was an internal one, the document does not provide straightforward support for this view. Article 1, for example, states that 'the Tibetan people shall return to the big family of the Motherland, the People's Republic of China,' indicating that Tibet was not part of the PRC when negotiations took place. Article 8 makes clear reference to the fact that Tibet had an independent military and was in charge of its own defence: 'Tibetan troops shall be reorganised step by step into the PLA and become a part of the national defence of the PRC.' Article 14, meanwhile, specifies that 'the PRC shall have centralised handling of all external affairs of the area of Tibet.' That there was a necessity to clarify this particular issue is an acknowledgement that the Tibetan Government had previously conducted its own foreign relations. Paradoxically, therefore, the Agreement which legitimises PRC control of Tibet serves to draw attention to the fact that Tibet was not, at the time the agreement was negotiated, simply one more province of China and nor, does it seem, did China treat it as one. Underlining this point is the fact that throughout the peace talks China referred to the Tibetan representatives as plenipotentiaries, an unusual choice of title to use for local delegates.<sup>82</sup>

There are further significant contradictions in the document that serve as warning flags for conflict that was yet to come. Article 3 states that 'the Tibetan people have the right to exercise national regional autonomy under the unified leadership of the Central People's Government.' The problem here is that the nature of the 'unified leadership' to be exerted by the central government remained uncertain, particularly in relation to Article 4, which states: 'The central authorities will not alter the existing political system in Tibet. The central authorities also will not alter the established status, functions and powers of the Dalai Lama. Officials of various ranks shall hold office as usual.' Yet, central control was already a significant alteration of the existing political system in Tibet. This contradiction was further compounded by Article 15

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<sup>82</sup> A 2011 PRC government White paper that cites official sources from the time describes the Tibetan delegation thus: 'The plenipotentiary representatives included the Chief Representative Ngapoi Ngawang Jigme, and Representatives Kemai Soinam Wangdai, Tubdain Daindar, Tubdain Legmoin and Sampo Dainzin Toinzhub' (Information Office of the State Council 2011). As mentioned earlier the Tibetan government stopped short of granting full plenipotentiary powers to the Tibetan delegation, the intention being only to conduct preliminary negotiations. China's use of the term plenipotentiary forms part of its argument that the Agreement was legitimate.

which stipulated ‘that In order to ensure the implementation of this agreement, the CPG shall set up a Military and Administrative Committee and a Military Area HQ in Tibet.’ The conflict this posed to Article 4 is clear. It should be noted that this provision stated that personnel were to be provided by the Central People’s Government, with local, patriotic, Tibetan personnel being appointed only where possible and only if approved by the central government.

Nonetheless, the Agreement did allow for significant autonomy for Tibet. Article 4 was backed up by Article 11, which provided that: ‘In matters relating to various reforms in Tibet, there will be no compulsion on the part of the central authorities. The local government of Tibet shall carry out reforms of its own accord, and, when the people raise demands for reform, they shall be settled by means of consultation with the leading personnel of Tibet.’<sup>83</sup> Given the dual religious-political system of Tibet law and governance which channelled both economic and political power into the monasteries, Article 7 too is significant: ‘The religious beliefs, customs and habits of the Tibetan people shall be respected and lama monasteries shall be protected. The central authorities will not effect a change in the income of the monasteries.’

For all its contradictions and flaws, and despite its contested origins, what is striking about the Seventeen Point Agreement is that it allowed for the continuation of a different political system within the borders of the PRC. This is evident in the actual terms of the agreement and also in its implementation, for under its terms the Tibetan legal system continued to operate, with Tibetan courts deciding cases on the basis of Tibetan law codes (French 1995a; Ginsburgs and Mathos 1959). Additionally, Tibet was exempt from reforms that were implemented throughout the rest of China. As late as 1957, Mao distinguished Tibet from other minority nationalities explaining that reform would not be carried out in Tibet and could only go ahead ‘when the great majority of the people of Tibet and their leading public figures consider it practicable’(Mao 1957). The Seventeen Point Agreement offered something far beyond the type of autonomy that had been implemented for minority nationalities elsewhere in China.

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<sup>83</sup> Goldstein has pointed out that during negotiations the term ‘local government’ was translated into Tibetan as ‘the government of an area’ misleading the Tibetan delegation (Goldstein 1989:765).

It is not uncommon for secondary literature dealing with regional national autonomy in the PRC to discuss Tibet primarily within the context of the PRC's general policy for minorities. Such an approach tends to de-emphasise the Seventeen Point Agreement. This is, I would suggest, because it is an anomaly and as such disrupts the narrative of legislative development. As shall be discussed below the general legislative framework governing minorities in the PRC is indeed essential to understanding the nature of Tibetan autonomy in its current form. However, the significance of the Seventeen Point Agreement as a piece of PRC legislation should not be underestimated.

The Agreement has, of course, remained controversial. From the point of view of the Tibetan-Government-in-Exile and its supporters the Agreement was made between two independent governments and is therefore an international treaty. As argued above the international diplomatic context adds to an understanding of the Agreement and merits its discussion within the context of international law. However, it is not necessary to abandon this argument in order to consider the position of the Seventeen Point Agreement within the context of PRC law. The PRC does, after all, maintain that it was a valid domestic legal agreement.

A critical point is that the Seventeen Point Agreement implemented a type of autonomy that has far more in common with the 'one-country-two systems' approach found in the Basic Law governing Hong Kong and Macao than it does to the framework governing minority nationality regions. The PRC government has remained hostile to such comparisons, stating in a 2004 White paper on Tibet that: 'The situation in Tibet is entirely different from that in Hong Kong and Macau. The Hong Kong and Macau issue was a product of imperialist aggression against China; it was an issue of China's resumption of exercise of its sovereignty' (Information Office of the State Council 2004). Yet, the Seventeen Point Agreement suggests otherwise, specifically citing imperialist aggression as the root cause of the need for Tibet to 'return to the Motherland'. Contrary to what the White paper argues, this seems to reinforce the similarity between the Tibet and Hong Kong rather than lessen it.

The same White paper states that the ‘peaceful liberation [of 1951] laid the foundation for regional ethnic autonomy in Tibet’ and that ‘the establishment of the Tibet Autonomous Region marked the full implementation of the regional ethnic autonomy in Tibet’(Information Office of the State Council 2004). The implication here is that the Seventeen Point Agreement was only ever intended to be transitional. Certainly, in the same 1957 speech mentioned above Mao commented that ‘according to the Seventeen Point Agreement reached between the central government and the local government of Tibet, reform of the social system must eventually be carried out’ (Mao 1957). Whilst this reveals political intent it also clearly overstates what is in the actual agreement and implies an element of compulsion that was not explicitly provided for. The Agreement provides for military reorganisation in line with the central takeover of defence and foreign relations, but it does not stipulate that social reform must occur. At best, the only Article that supports such a statement is Article 10, which states that ‘Tibetan agriculture, livestock raising, industry and commerce shall be developed step by step and the people's livelihood shall be improved step by step in accordance with the actual conditions in Tibet.’ Mao’s speech therefore highlights the profound contradictions within CCP policy on Tibetan autonomy.

By 1959 these contradictions had created extensive conflict between the Tibetan and Chinese governments. The Tibetan government’s primary complaint was that reform was being forcibly implemented in contravention of Article 11. This shift towards coercion led to the 1959 Tibetan uprising. This resulted in the Dalai Lama going into exile, where he repudiated the Seventeen Point Agreement. Meanwhile, in Tibet the central government pushed forwards with Democratic Reform, and in 1965 central Tibet became incorporated into the wider framework of regional national autonomy as the Tibetan Autonomous Region.

Mao’s speech of 1957 and the White paper of 2004 present difficulty to the rule of law narrative which has been carefully constructed by the PRC in recent years. On the one hand the Seventeen Point Agreement has been incorporated into this narrative of rule of law. On the other hand, presenting the Agreement in this fashion only serves to draw attention to the fact that its provisions for significant autonomy

were, in practice, subservient to a policy of assimilation.<sup>84</sup> In both cases the Agreement has been subjected to a political reinterpretation that seems inconsistent with the original document. What is interesting about this is that whilst in many ways the Seventeen Point Agreement is an anomaly within the context of PRC minority autonomy law, its susceptibility to the politics of assimilation is a shared feature with other PRC minority legislation. It is precisely because it is anomalous that the Seventeen Point Agreement deserves to be considered part of a general legislative trend, for its disruption of the evolutionary narrative constructed around PRC minority autonomy law sheds light upon the wider context within which that law takes form.

One of the effects of this is to highlight the disparity between reform-era policies that have ‘led to a reflorescence of minority identities’ and the historical cultural reality from which these newly (re)emerged identities are derived (Sautman 1999:84). Regional National Autonomy Law is one aspect of a growing body of ‘ethnic law’ (*minzu fa*) which seeks to equalise economic, cultural and political relations between Han and non-Han in China. A significant corpus of this law involves preferential policies which benefit minorities in diverse sectors such as family planning, school and university admissions, employment, regional subsidies and tax breaks (Sautman 1998). Such provisions are not confined to minority issue specific legislation and are found in a range of national laws such as Tobacco Monopoly Law (1991, Article 6) and Mineral Resources Law (1996, Article 10) (Sautman 1999:289). In this regard China leads the way internationally.<sup>85</sup> The development of such legislation has very rightly challenged a ‘Western discourse on human rights in China [that] typically assumes that China’s minority rights law must be a sham because China is an authoritarian state’ (Sautman 1999:283). Nonetheless, there remains a fundamental contradiction between the state’s role in protecting minority rights and its

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84 See Judge Sefariade, Dissenting opinion, *Lighthouse in Crete and Samos* case, P.C.I.J., Series A, Nos. 20/1, Judgement 14 (1929), p.44. The term assimilation is here used to highlight the process by which the CCP sought to implement policies of reform in Tibet that had already been implemented elsewhere in China. There is however a longstanding debate about Chinese ethnic policies in which ‘assimilation’ is distinguished from ‘integration.’ This suggests a spectrum of ethnic incorporation, in which assimilation is the most extreme form and involves minorities losing their unique characteristics. Integration, meanwhile, involves minorities retaining ethnic characteristics within a new political context where both Han and minority sectors of the population adjust their political identification (Sautman 1999:300).

85 For an international comparison of preferential policies, see generally Sowell (2005).

role in defining the limits of those rights within a one-party system that restricts minority participation.<sup>86</sup>

### **7:3 Regional National Autonomy in the Mao Era**

The legal origin of autonomous ethnic governments within the PRC as a whole dates back to the 1949 Common Programme, and it is from this document that the Seventeen Point Agreement took its authority.<sup>87</sup> The provisions in this interim constitution for autonomous administrative bodies at the regional, provincial, prefectural and county levels reflected an ongoing debate in the republican era concerning federalism, which fluctuated between the unequivocal rejection of a multiethnic society, and the notion that ‘the government should help and guide the racial minorities in the country toward self-determination and self-government’ (Sun 1953:10). The CCP made strategic use of inconsistencies within Kuomintang policies by promoting a unifying version of federalism that sought to bring the outlying territories into a PRC state. This vision of federalism was deployed throughout the 1930’s and 1940’s when the CCP was endeavouring to attain central control. During this period the party endorsed, in the form of a constitution and a written resolution, the concept of autonomous self-government and self-determination for ethnic minorities, and promised them the right to secede and form their own states (Lee 2001:274).

Nonetheless, despite this element of voluntarism, the emphasis was upon solidarity and unification was the goal. In the context of international class struggle Marxist theory rejected nationalism as a final outcome. More immediately, the minority nationalities also figured prominently in the PRC’s strategy for national security, for whilst the minority nationalities only comprised 6 percent of the PRC population, they inhabited nearly 60 percent of PRC territory, much of it in border

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86 Of particular relevance is the requirement for party members to be atheist, which prevents the participation of religious minorities in the party. There is a lack of minority representation within the CCP generally, particularly within its higher strata (Sautman 1999:297). Figures for the 7th TAR’s People’s Government (1998-2003) show 58 percent of chairmen were Tibetan and that 42 percent of top officials in the TAR Regional Party Committee were Tibetan. The Regional Party Secretary has never been a Tibetan. To place this in the wider context, statistics for all political and administrative bodies in the TAR suggest that only 34 percent of regional department level officials and above were Tibetan. In their analysis of this data, Conner, Barnett and Shakya (1997) argue that the posts occupied by Tibetans in the TAR are of a nominal, decorative nature.

87 The Common Program of The Chinese People’s Political Consultative Conference, September 29th 1949.

areas.<sup>88</sup> The significance of this was brought into focus by the Second Sino-Japanese war, the minority nationalities playing a critical role in national defence. Mao's 1938 speech on 'CCP Policy On Minority Nationalities' placed particular importance upon this:-

In view of the enemy's scheme to split the national minorities in the country which they have put into effect and are now trying to expand further, the eighteenth item of our present task is to unite all nationalities and to fight together with them against the Japanese. ....In the common struggle against Japan, they shall have the right to handle their own affairs and at the same time to unite with the Hans in building a unified country (Mao 1938:7).

It is clear that the CCP believed the minority nationalities were strategically essential to the success of China and that this had a strong influence on policy both before and after the founding of the PRC in 1949. It is also clear that from the outset the policy on minority nationalities contained contradictions. Minority nationalities were to have the right to handle their own affairs, yet the requirement 'to unite with the Hans in building a unified country' suggested a process of assimilation. Underlying this was the contradiction inherent to the 'common struggle' against foreign imperialism, for whilst the minorities helped to defend the Han mainland the flip side of this was that the minorities represented a unique vulnerability.

These concerns helped to shape policy on regional national autonomy, and indeed still form the backdrop of autonomy policy today. As the government's White Paper on minority autonomy in 2005 puts it:-

At the critical moment when China faced the danger of being carved up, and when the nation was on the verge of being subjugated, the Chinese people of all ethnic groups united as one, and put up the most arduous and bitter struggles against foreign invaders in order to uphold the country's sovereignty, and win national independence and liberation (Information Office of the State Council 2005).

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<sup>88</sup> These figures are common across the literature, but importantly they are cited in primary sources originating from the CCP (Mao 1956:55; Shaoqi. 1956:60).



However, although this common struggle against aggression has been the general framing language for minority policy, Tibet has always been set apart. The preamble of the Seventeen Point Agreement suggests a very different dynamic when it states:-

And the Local Government of Tibet did not oppose the imperialist deceptions and provocations, and adopted an unpatriotic attitude towards our motherland. Under such conditions, the Tibetan nationality and people were plunged into the depths of enslavement and suffering.

As discussed above the Seventeen Point Agreement provided for a very strong form of autonomy but this was undercut by an increasing political requirement for assimilation. One of the results of this requirement was the abandonment of the Agreement and Tibet's incorporation into the legislative framework that governed minority nationalities in the PRC as a whole. This process has not remained uncontested. That conflict has persisted is evident in the 1989 mass unrest in Lhasa which marked the 30th anniversary of the 1959 Tibetan uprising and led to the declaration of a state of emergency. More recently, in 2008 mass riots in Lhasa led to the region being closed to outside observers. Tibet's distinction from other PRC minorities has potential relevance to this conflict. If minorities who had supported the struggle against foreign imperialism represented a potential weakness in state security, then the risk posed by Tibet was double fold. Similarly, if autonomy was about co-opting the minorities in the socialist endeavour, the nature of Tibet's incorporation into this framework only highlighted the contradiction between autonomy and central CCP control.<sup>89</sup>

When the CCP gained power these contradictions were embedded in the 1949 Common Program, which allowed for the creation of autonomous areas 'where minority nationalities are concentrated' (Article 51). Setting the standard still in place today, the Common Program declared that any act threatening to split 'the unity of the various nationalities shall be prohibited' and exhorted that all nationalities 'shall oppose

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<sup>89</sup> The challenge that the 1959 Uprising represented to the CCP was significantly increased by the popular nature of the revolt. Despite the PRC's insistence that it was the work of upper class 'feudalists', in fact the participants did not emerge from one particular economic class. This is usefully discussed in Norbu (1979).

imperialism and their own public enemies' (Article 50). Despite this after the party came to power it initially allowed laws to be made at the provincial level under a multi-layer legislative system (Pahn 1996:91). However, this multi-layer system was abolished in the 1954 constitution, and whilst autonomous regions for minority nationalities were still provided for legislative control was returned to the centre.

This shift towards greater central control was foreshadowed by the General Program of the People's Republic of China for the Implementation of Regional Autonomy for Minority Nationalities (1952), which provided a more detailed framework for regional autonomy than that given by Article 51 of the Common Program. 130 national autonomous regions had already been established by the time the General Program was promulgated, and it was clear that the party felt it necessary to clarify the limits, and the purpose, of autonomy. A brief survey of the document shows the manner in which this was to be achieved. Minority nationalities were guaranteed the right to form people's governments in autonomous areas, with proportional representation for other nationalities inhabiting the same regions (Article 12). Accordingly, an autonomous government could draft 'special regulations for the area' providing they were 'within the limits of its autonomous jurisdiction' (Article 23) and could carry out internal reforms 'in accordance with the wishes of the majority of its people' (Article 18).

The legislation imposed potentially significant limits. Article 2 stressed that autonomous organs were local governments operating 'under the unified leadership of the central people's government.' Article 3 emphasised the importance of central policy in this process by stipulating that 'in administering the internal affairs of their own nationality, the people in each national autonomous region shall advance along the 'general line' set by the Common Program. Meanwhile, Article 34 highlighted the paternalistic nature of the central government's relationship to minorities, stating that 'The people's governments of higher levels shall take appropriate measures to acquaint the people of the national autonomous regions with the advanced experiences and conditions in political, economic, and cultural development.' The clearest indication that regional national autonomy was seen as a means to achieve to greater unification is given in Article 35. 'The people's governments of higher levels shall educate and assist the people of all nationalities in observing an attitude of equality, fraternity,

unity, and mutual assistance among the nationalities, and in overcoming all tendencies to domination by the majority nationality or to narrow nationalism.’

In a report made the week the General Program was promulgated Ulanhu, the Vice-Chairman of the State Nationalities Affairs Commission, highlighted the nature of the contradictions autonomy posed, asking ‘Since we believe in progress toward universal harmony, why should we now bring about regional autonomy for nationalities? Will its implementation foster narrow nationalism?’ The answer, he suggested, was:-

It is just because we want all nationalities to go forward together into a future where all mankind shall live in peace, because we want to eliminate narrow nationalism, and because we want to hasten and enhance the political, economic, and cultural development of areas inhabited by minority nationalities that we must establish regional autonomy for nationalities (Ulanhu 1952:23).

From this point of view there was no contradiction between regional autonomy and socialist unification, for autonomy was a method to achieve unification rather than a means of protecting cultural difference. However, this leaves another contradiction unresolved, for if the version of autonomy on offer is one that dictates that the goal is the end of autonomy, the question must asked: is this is any kind of autonomy at all? If this is a contradiction present in the general framework governing minority legislation in the PRC, it is a contradiction that is particularly significant in the case of Tibet which was bought back to the motherland with an agreement that ‘the central authorities will not alter the existing political system in Tibet’ (Seventeen Point Agreement, Article 4). In many ways the development of legislation on autonomy in the PRC can be seen as an attempt to resolve, or at least contain, this contradiction.

Shortly after the creation of the TAR in 1965 these contradictions between autonomy and the socialist unification became the source of intense division within the party. With the onset of the Cultural Revolution it was declared that the nationality issue was, in the final analysis, a class issue. Accordingly, those who supported regional autonomy were accused of advocating national separatism and ‘obliterating the essence of the dictatorship of the proletariat’ (Heberer 1989:24). The Cultural

Revolution's insistence that the cultural differences of minority nationalities were a problem of class led to a systematic attempt to abolish minority customs, costumes, languages and scripts. Preferential policies were abolished on the grounds that they ultimately prevented minority nationalities from participating in the revolution. Agencies for the minorities were abolished, as were many autonomous regions.

The TAR survived as an administrative unit throughout this period, but the aggressive and coercive attempt at assimilation during these years led to the wholesale abandonment of the features of autonomy that had survived the democratic reforms of 1959. It was not until the post-Mao period that regional autonomy was rehabilitated as a method of dealing with the minority issue. However, despite the massive regeneration of minority cultural institutions that this prompted, in the case of Tibet there has never been a restoration of the kind of autonomy implemented under the Seventeen Point Agreement. On the contrary, after a brief period of liberalisation in the 1980's, there has been a shift back towards greater central control. In the contemporary setting, however, this has been implemented through legal mechanisms rather than direct policy, and this has formed part of the PRC's engagement with international standards for rule of law.

#### **7:4 Regional National Autonomy in the Post Mao Era**

The current legal framework for autonomy was established by the 1982 Constitution which recognises two types of autonomy. Article 4 establishes regional autonomy for minority nationalities. Article 31 allows the state to 'establish special administrative regions when necessary,' prescribed by law 'in the light of the specific conditions'. The implementing legislation for Article 4 is the Law on Regional National Autonomy (LRNA), first promulgated in 1984 and revised in 2001. It is this legislation that governs autonomy in Tibet. Article 31, meanwhile, provides the authority for the 'one country two systems' type of autonomy implemented in Hong Kong and Macao.

Article 4 lays out the basic features of minority autonomy, placing it in the context of state protection of equality. Autonomy is granted 'where people of minority nationalities live in compact communities' and it stipulates that 'the people of all

nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.’ Article 4 is fleshed out by Section 6 of the constitution which outlines the basic functions and powers of ‘the Organs of Self-Government of National Autonomous Areas’, and provides the authority for autonomous areas to enact and adapt legislation subject to central approval (Articles 115 and 116). The articles in this section are subsequently repeated and elaborated upon in the LRNA.

Although commentators have remarked on an explosion of local level legislation in recent years, legislation in Tibet does not follow this pattern. It must be recognised that the definition of autonomy is not legally precise. There is considerable uncertainty as to what exactly autonomous legislative powers should and can be vis-à-vis the over-arching principle of ‘democratic centralism’ (LRNA, Article 3). Articles 19 of the LRNA allows National Autonomous Areas (NAAs) to ‘enact regulations on the exercise of autonomy and other separate regulations in the light of the political, economic, and cultural characteristics of the nationality or nationalities in the area concerned’ and Article 20 grants power to modify any central legislation for local requirements. However, Article 5 places NAAs under obligation to uphold the unity of the PRC and to guarantee the implementation of other laws. There is no clarification as to what exactly these other laws are and this question remains un-addressed in the relevant legislation of the TAR People’s Congress (Keller in McCoquodale and Orosz 1994:65). Furthermore, any legislation or modification originating from TAR administrative bodies requires approval from the Standing Committee of the NPC (Article 19 and Article 20). Critically, the very nature of Tibet’s incorporation into the PRC potentially makes any exercise of legislative autonomy a threat to national unity and subject to central veto. Certainly, local legislation has consistently followed in the footsteps of central directives. Furthermore, compared to other major provinces in eastern China the TAR has enacted fewer laws in fewer areas (Keller in McCoquodale and Orosz 1994:65; Chao 1994; Cho 2006).

Recent changes in education policy serve to clarify this point. A significant piece of autonomy implementing legislation passed by TAR congress was the Trial Regulations on the Study, Use and Development of the Tibetan Language (1987). The regulations were in keeping with Article 10 of the LRNA, which guarantees NAAs’

freedom to develop their own languages. It stipulated, *inter alia*, that by 1997 most subjects in secondary and tertiary institutions would be taught in Tibetan and that Tibetan would be used in official documents and meetings. Significantly, it also stipulated proficiency in Tibetan to be a qualification for government employment (UNPF 1997:Ch.6.3.3). However, the regulations have never been implemented. Instead, by 1997 only one of seventeen courses at Lhasa University was taught in Tibetan and a Chinese official who did not speak the Tibetan language was the university head (UNPF 1997:Ch.6.3.3). The central government has since pursued a policy of promoting Mandarin Chinese as the primary language of instruction at the secondary and tertiary level, and whilst Tibetan language classes are provided for in the syllabus such classes are supplementary rather than foundational.

Underpinning this development was a perception in the government that the Tibetan language creates nationalist sentiment. Certainly, as most Chinese cadres in the region cannot readily understand Tibetan, security issues are undoubtedly of direct concern to Chinese authorities.<sup>90</sup> However, there is evidence to suggest that there was a strong ideological basis for this shift in policy and that this has remained a driving force of policy since. This shift is associated with Chen Kuiyuan, who was appointed TAR Party Secretary in 1992, although this is not to presume that the shift is the result of one individual. The appointment of Regional Party Secretaries in the PRC is a highly secretive process carried out by the Party's Central Committee in Beijing. It is worth noting here that whilst one of the Four Cardinal Principles on which Chinese politics is based is 'Leadership by the Communist Party', China's autonomy laws do not provide for the role of minorities in the Party (UNPF 1997:Ch6.3.1). The TAR Party secretary has never been a Tibetan, and whilst a Tibetan occupies the highest government position in the TAR, the post affords only nominal power (TIN 2001:8).

In 1994 Chen participated in the Third Tibet Work Forum, which set the guiding principles for work in the region. Work Forums have been the main policy organ for Tibet since 1980 and ultimately dictate the requirements of local legislation.

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<sup>90</sup> Compounding this anxiety over national security is the fact that many refugees go into exile to seek an education, access to education being guaranteed to all refugees by the Tibetan-Government-in Exile. When I worked at a Tibetan school alongside the U.N Tibetan Refugee Reception Centre in Nepal (1999-2000), it was evident that a significant number of the refugees, who arrived weekly, came to be educated, with lay people primarily seeking Tibetan and English language instruction. Religious education was also cited as a reason to undertake the formidable journey across the Himalaya.

Chaired by the General Secretary of the CCP, even the Regional Party Secretary is excluded from the working group (Conner, Barnett and Shakya 1997:39).<sup>91</sup> Without a doubt, policy decisions concerning Tibet are made at the highest level of the Party. The 1994 Forum was important for it ushered in a new hard-line set of policies for Tibet and initiated increasing central control. These policies, although implemented very quickly, have taken time to surface in formal legislation. However, much of the legislation that has been promulgated since 2004, particularly that concerned with religious issues, can be traced back to this Forum. Whilst there have been two other Forums since, one in 2001 and another in 2010, the more recent Forums have not demonstrated any significant shifts in policy (CECC 2010:219-232). For this reason the 1994 Forum remains highly significant.

Shortly after the Third Forum, Chen firmly underlined the political requirements of education in the TAR, stating that, ‘the essence of educational work is to cultivate qualified constructors and successors for the socialist cause, and this is the sole basic mission in ethnic education’.<sup>92</sup> A key concern that arose in relation to this was that use of the Tibetan language facilitated the spread of religious propaganda in schools. Chen expressed sentiments such as these when he said:-

Splittist elements try to infiltrate the educational circle by using narrow nationalism and religion. Scriptures have entered some schools and become textbooks in the classrooms. Some students have joined the ranks of monks. Some people purposely interpret this phenomenon as a national feature in an attempt to legalise religious interference in educational affairs.<sup>93</sup>

The basic premise here was that cultural autonomy interrupted the transmission of correct political thought. In his speech Chen identifies a struggle over the definition of authentic Tibetan culture in which autonomy law becomes a battleground between the state and ‘splittist elements.’ ‘Narrow nationalism’ and ‘religion’ are both cited as threats. The suggestion is that there is some other from of nationalism that can incorporate ‘Tibeteness’ but religion, it seems, cannot be rehabilitated so easily. Religion is separated from other aspects of culture, and marked

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<sup>91</sup> The RPS is currently Chen Quanguo, who took office in 2011.

<sup>92</sup> Chen Kuiyuan, in a speech during an inspection tour of Chamdo, November 1994. Cited in TIN 2001:13.

<sup>93</sup> Chen Kuiyuan, Tibet Daily, October 28th 1994; cited here in TIN 1996:41.

out as a dangerous interloper in national identity. Indeed, Chen's suggestion that religion is not an authentic 'national feature' is something he went on to argue with great force in a 1997 speech. Stating that 'we must distinguish the essence from the dross' when inheriting traditional culture he questioned if 'Tibetan national culture' was 'equivalent to a Buddhist culture.' To view them as synchronous is, he argued, 'utterly absurd,' for 'Buddhism is a foreign culture' that 'came into being only a little over 2,500 years ago.' Thus, elevating religion serves only to weaken the nationality and fuel separatism:-

The view of equating Buddhist culture with Tibetan culture not only does not conform to reality but also belittles the ancestors of the Tibetan nationality and the Tibetan nationality itself. [...] Making use of religion in the political field, separatists now go all out to put religion above the Tibetan culture and attempt to use the spoken language and culture to cause disputes and antagonism between nationalities, and this is the crux of the matter.<sup>94</sup>

It has been noted that whilst the system of regional autonomy in the PRC does not offer significant political autonomy it does provide meaningful autonomy over 'soft issues' such as education, culture, the environment, sports, health care, and science and technology (Moneyhon 2002:141; Pahn 1996:107). Significantly absent from this list is religion. In the past twenty years there has been a rapid proliferation of central legislation regulating Tibetan religious activity that, despite its profound implications for Tibetan culture, has emerged outside of the framework of regional autonomy law. This will be the subject of detailed analysis in Chapter eight. What is of interest here is that by placing education, the spoken language and culture in the frame as potential vehicles of anti-state activity, Chen illustrated that even soft issues were open to central state control. This is particularly so when these features are contingent with religious activity, which he treats as a non-authentic add-on to Tibetan national identity. Ultimately, these views were able to achieve consistency with the law governing autonomy, for autonomy granted by the LRNA is always subject to central government veto, and the legal framework is such that any centrally promulgated law can take priority over regional legislation. Article 66 of the Legislation Law (2000) makes the limits placed upon autonomous area legislatures very clear:-

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<sup>94</sup> Chen Kuiyuan, *Xizang Ribao*, 16th July 1997; cited here in Barnett 2001:12.



Where certain provisions of the laws and administrative regulations are concerned, adaptation on the basis of the characteristics of the local nationality (nationalities) may be made in autonomous regulations and separate regulations, but such adaptation may not contradict the basic principles of the laws and administrative regulations; where the provisions of the Constitution and the Law on Regional National Autonomy as well as the provisions in other laws and administrative regulations specially formulated to govern the national autonomous areas are concerned, no adaptation may be made.

Whilst it is not unreasonable that NAA's should lack capacity to amend the constitution or the LRNA, the restriction on amendments to 'other laws and administrative regulations' governing ethnic minority areas casts a potentially wide net. The failure of the 'Trial Regulations on the Study, Use and Development of the Tibetan Language' should be understood in this context. Despite the codification of minority rights, protection is far from guaranteed when 'other laws' can be called upon to implement policy concerned with all aspects of Tibetan culture. In this case, the introduction of Chinese language classes and the withdrawal of pilot studies to extend Tibetan language teaching was inconsistent with the Trial Regulations. It was not, however, inconsistent with Article 6 of the centrally promulgated Compulsory Education Law of 1986 (revised in 2006) which, whilst allowing for ethnic languages as an option, called for the promotion of Putonghua (common speech based on Beijing pronunciation).<sup>95</sup> The Education Law of 1995 restates this provision (Article 12) and reinforces central government control in the stipulation that 'educational activities shall conform to the State and public interests' (Article 8).

On 22 March, 2002 the China Daily reported 'the first government regulation[s] ever passed in China on preserving an ethnic language'. The report referred to the 'Regulations on the Study, Use and Development of the Tibetan Language' promulgated by the TAR congress the day previously (TIN 2003). These new regulations remove the preferential provisions of its successor and rather than providing for the gradual promotion of the Tibetan language over and above Chinese,

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<sup>95</sup> This provision has been excluded from the 2006 revision, but it has been retained in the Education Law of 1995. This concedes that minority languages 'may be used for instruction,' but the emphasis is upon mandarin Chinese: "Putonghua (common speech based on Beijing pronunciation) and the standardized characters designed for use throughout the country shall be widely used in instruction in schools and other institutions of education." (Article 12).

place emphasis upon the equality of the two languages. In effect this raises the status of Chinese and places non-Chinese speakers at a disadvantage. Article 10, for example, stipulates that the state should give priority to employing ‘those who are proficient in the use of both Tibetan and the common national language’. The ‘common national language’ was defined by the centrally promulgated Law on the Standard Spoken and Written Chinese Language (2000), which places ‘local governments and other relevant organs’ under obligation to ‘adopt measures to popularise putonghua and to promote standard Han characters’ (Article 4).

The evolution of the Regulations on the Study, Use and Development of the Tibetan Language offers an instructive example of the process by which lawmaking in autonomous areas can be moulded to central policy, even when it concerns ostensibly ‘soft issues.’ In their latest, significantly watered down, form the regulations have been lauded by state media as an example of the progressive nature of ethnic governance and as a triumph for the rule of law in securing minority rights. As the above analysis shows, securing minority rights is a double edged sword, for as the features of Tibetan culture have become increasingly subject to legal codification, the legitimate space that it is allowed to inhabit becomes subject to increasing layers of legal restriction. The new regulations are, in the final analysis, consistent with Article 10 of the LRNA, which guarantees Autonomous Areas ‘the freedom to use and develop their own spoken and written languages.’ Nonetheless, despite the framing language of equality, this is a freedom defined by its exceptionality. That is, the freedom granted is the freedom to depart from the preferred standard, and when this preferred standard expands into greater areas of Tibetan cultural life the room left for such a departure gets ever less.<sup>96</sup>

### **7:5 The 2005 Provisions on the Implementation of the Law of the People’s Republic of China on Regional Autonomy**

The above analysis suggests that despite the withdrawal from the intense assimilationist policies of the Cultural Revolution, there is reason to conclude that in

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<sup>96</sup> The impact of this language policy can be seen in a number of significant protests. An outbreak of protests in 2012, involved thousands of Tibetan students and concerned the removal of Tibetan language textbooks in middle schools (CECC 2012:164).

keeping with the approach of the General Programme autonomy is the method not the goal. In other words, autonomy is a process by which the socialist modernisation of the unitary state can be best achieved. As the preamble of the Constitution declares:-

The People's Republic of China is a unitary multi-ethnic state created jointly by the people of all its ethnic groups. Socialist relations of equality, unity and mutual assistance have been established among the ethnic groups and will continue to be strengthened. In the struggle to safeguard the unity of the ethnic groups, it is necessary to combat big-ethnic chauvinism, mainly Han chauvinism, and also to combat local-ethnic chauvinism. The state will do its utmost to promote the common prosperity of all ethnic groups.

The 2005 Provisions on the Implementation of the Law of the People's Republic of China on Regional Autonomy place this in perspective. Its thirty-five articles do little to clarify the legislative functions of autonomous areas or to provide for the enforcement of minority nationality rights. Rather the law expresses the wider development plan of Beijing and sets priorities for achieving this.

Several of the provisions are articulations of existing state wide policies on areas such as health (Article 26), welfare (Article 27) and education (Articles 19-21), and where they make specific minority provisions, such as in preferential policies for minority students accessing higher education, the emphasis is upon bringing minority areas up to the level of national standards. To this end the provisions layout preferential policies on public finance and tax (Article 9 and 10), mechanisms to provide financial loans (Article 11) and measures to support ethnic trade (Article 12 and 13). The state has placed itself under an obligation, albeit not necessarily an enforceable one, to 'intensify the poverty relief and development of ethnic autonomous areas' (Article 16), a goal that is to be further met through the mobilisation of 'non-public sectors of the economy' for aid in infrastructure and utility (re)construction (Article 17).<sup>97</sup>

The 2005 implementation measures expand upon amendments to the Regional National Autonomy Law made in 2001, where Articles 55, 61 and 65 were amended to stipulate preferential policies on investment, trade and resource extraction. In as much

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<sup>97</sup> Articles 30-32 provide for the supervision of the implementation of the provisions.

as the 2005 provisions were already largely actionable under the existing legislation they are therefore best read as a statement of intent; a directive on where focus should be placed, rather than a clarification of the existing legislative function of autonomous areas.

The 2001 additions to the preamble of the Regional National Autonomy Law offer additional insight into what this process entails —and the language does emphasise that it is a process— adding for example, that ‘regional national autonomy shall be adhered to and perfected continuously so that it will have a still greater role to play in the country’s socialist modernisation in the years to come.’ The amendments stipulate that autonomous areas shall ‘persevere in reform and opening to the outside world’ and that they shall ‘develop socialist market economy, strengthen the build-up of socialist democracy and legal system, strengthen the build-up of socialist spiritual civilisation.’ The goal the preamble sets is the transformation of the unitary multinational state into a socialist country that is ‘prosperous, powerful, democratic and culturally advanced.’

The key words are ‘prosperous’ and ‘powerful’, to which might be added the term that appears in the introductory articles of the implementing provisions: ‘ethnic solidarity.’ Such language suggests that the Autonomy Law has been positioned within the wider context of state development. In 2000 a government white paper proposed a twenty year plan for China to achieve the status of a developed country, and launched the ‘Western Development’ plan to bring the western regions, including the TAR and other Tibetan autonomous areas, up to the level of the east.

Given the fundamentally universalistic ethos behind this vision of socialist modernisation, and the fact that it is largely centre driven, it raises clear challenges to the exercise of regional autonomy. This raises the question of whether the existing legislation is robust enough to protect autonomy and Tibetan cultural rights. As discussed above it is apparent that the lawmaking process gives the central government significant freedom to pursue policies in Tibetan Autonomous Areas that may have profound impact upon areas seemingly protected under the LRNA. It is therefore instructive to consider what the implementing provisions bring to this framework.

Development is evidently not a culturally neutral process. The implementing provisions themselves suggest as much. Article 5, for example, contains the first reference to culture in the document, where it is cited as something to be developed alongside ‘economy, education, science, technology’ and ‘health, sports, etc. so as to realise the overall, concerted and sustainable development.’ This tidy separation of ‘culture’ from other components of society and state, combined with the notion that it too is something to be developed raises fundamental questions about the nature of Tibetan autonomy in the PRC. Indeed, by positioning culture in this way, asserting it to be a discrete, free-floating unit, the state is effectively taking control of the act of definition. This means that the space left for articulating what ‘culture’ is, or is not, becomes circumscribed by state demands. Article 5 provides that the government ‘shall solicit the opinions of the autonomous areas’ when formulating mid and long term economic and social development plans, but without a clear obligation for consultation, or any requirement to meet certain thresholds of consensus, decision making remains a top-down rather than bottom-up process.

Other provisions in the document support this analysis. The term culture appears another four times. Article 14 calls for special measures to integrate and develop the ‘inhabitation, living, culture, education, medical health, environmental protection, etc.’ of border areas, with an emphasis on the significance of such areas to national security and defence. Article 15 sets much the same requirement for minority areas generally, only without the emphasis upon defence and security, stating that:-

The superior people's governments shall integrate the areas inhabited by ethnic minorities into the economic and social development plans, and give them more support, especially in the aspect of transport, energy, ecological environment protection and construction, rural infrastructure construction, radio, film and television, culture, education, medical health, mass production and living, etc.

Article 18, outlines further methods of development by seeking greater engagement between economically developed areas of China and ethnic autonomous areas in order to ‘accelerate the development of economy, culture, education, science and technology, and sports.’

There remain two articles that approach an articulation of specific protections of minority culture. The first is Article 24 which stipulates:-

The state shall lay emphasis on the inheritance and development of the traditional culture of ethnic minorities, regularly hold traditional sport games of ethnic minorities, and give cultural and art performances of ethnic minorities to promote the ethnic cultural and art creation and enrich the cultural life of all ethnic groups.

The article also provides for state support in translating, publishing and broadcasting minority languages. The state does however retain a clear supervisory role, specifying an ‘emphasis on the public-good cultural cause in ethnic forms and with ethnic characteristics.’

Article 25 offers the most straightforward expression of cultural protection in the provisions:-

The superior people's government shall support the protection and rescue of the non-physical cultural heritage, ancient and historical sites, cultural relics and other material cultural heritage of ethnic minorities, shall support the collection, sort-out and publishing of ancient books of ethnic minorities.

As important as this protection is to the preservation of the history and memory of the Tibetan nation, in the context of a document that emphasises centre led development it creates a sharp contrast. Set against the drive to socialist modernisation it suggests that autonomy is an act of curatorship, an act of acknowledging the past without allowing it to divert the state from its chosen path of progress. That this progress is separated from the functions of autonomy is, I would suggest, a reflection of this dynamic. Progress is a duty derived from the state gift of cultural rights. Hence, Article 34 creates the obligation that autonomous areas must ‘formulate concrete measures in accordance with the present Provisions, and report their implementations to State Council.’

In a 1956 speech Mao discussed the relationship between the Han and the minority nationalities. Reminding the audience that minority nationalities occupied 50-60 percent of the territory of the PRC he said:-

We say China is a country vast in territory, rich in resources and large in population; as a matter of fact, it is the Han nationality whose population is large and the minority nationalities whose territory is vast and whose resources are rich, or at least in all probability their resources under the soil are rich.

The air in the atmosphere, the forests on the earth, and the riches under the soil are all important factors needed for the building of socialism, but no material factor can be exploited and utilized without the human factor. We must foster good relations between the Han nationality and the minority nationalities and strengthen the unity of all the nationalities in the common endeavour to build our great socialist motherland (Mao 1956).

The LRNA implementing provision achieves continuity with this exhortation, and it is within this context that the drive to development and resource extraction should be placed. Autonomy is, in this context, the effective management of the ‘human factor’ that facilitates this process. As Article 1 states, the provisions are ‘For the Purpose of helping the ethnic autonomous areas to accelerate the economic and social development, enhancing the ethnic solidarity and promoting the common prosperity for all ethnic groups.’ Article 3, meanwhile, stresses that autonomous areas shall ‘actively protect the interests of the state as a whole.’ Between these statements of purpose and obligation falls Article 2, which requires people’s governments at all levels to strengthen public awareness of existing law and policy and to develop further measures ‘so as to protect the legitimate rights and interests of the ethnic minorities.’ The preliminary conclusion drawn here is that whilst language of rights protection seems a noble public face for the law this is belied by its mechanisms of action, for as legislation proliferates the space within which culture can be expressed is subject to ever greater restriction. Set against this, the educative role of the law inferred by Article 2 suggests a state controlled process of identity creation and recalls Foucault’s thesis that ‘Discipline “makes” individuals; it is the specific techniques of a power that regards individuals both as objects and as instruments of its exercise’ (Foucault 1995:170).

In the past decade the use of legal education as a tool of social engineering has reached full expression in the compulsory ‘Patriotic Education Drive’ carried out in Tibetan monasteries and nunneries. As noted earlier, recent legislation governing Tibetan religious activity has been enacted outside the framework of Regional National Autonomy. A particular feature of this engagement with religion is the use of the law to create and transmit a historical narrative that shapes Tibetan national identity, and it is this which will be examined in Chapter eight.



## Chapter Eight

### 8:1 Introduction

With regards to the unique characteristics that mark out religious policy in Tibet, there is a correlation with developments in the policy of regional autonomy which has mapped a similar path. It is clear, however, that whilst the system of regional autonomy has provided a framework which allows the state to manage ethnic difference, there is a separate regulatory system, centre led and party controlled, that has shaped religious policy China wide. There are a number of interesting observations that arise from this. Legislation concerned with regulating religious activity has developed rapidly in the past decade. Much of this recent legislation has been formulated and issued by the central government. This includes legislation designed to deal with the specifically Tibetan Buddhist tradition of reincarnation lineages. Evidently Tibetan religious activity is perceived to be of critical importance to the unity and stability of the country as whole.

A consistent argument made in official Chinese sources is that the conflict between Tibet and China is primarily a product of the British invasion of Tibet in 1904. Specific to this is the notion that Tibetan nationalism was artificially created by the British, along with the myth of Tibetan independence, in order to further British imperial interests. It is clear that the British involvement had enormous ramifications for the legal status of Tibet, but the question that remains unanswered is why, if the Sino-Tibetan conflict is indeed the result of British imperialism, should the locus of conflict remain so resolutely centred upon matters of religion? Certainly, British government sources show that it was policy to encourage Tibetan nationalism and consolidate Tibetan independence. However, what was striking about this policy is that it aimed to develop a uniquely secular Tibetan identity. To this end the British sponsored the Tibetan nobility, and actively sought to coalesce a distinctly modern

Tibetan nationalism around such cultural imports as football, sweet tea drinking and British military dress (McKay 2001, Goldstein 1989:Ch3).<sup>98</sup>

These activities were encouraged amongst the lay nobility, and were perceived by the religious establishment as a direct threat to Tibetan society. Additionally, this emphasis upon developing the secular components of Tibetan government ran counter to a structural bias within the Tibetan social system that favoured ecclesiastical power over and above that of the nobility. This bias resulted from the requirement to give land and resources to reincarnated lamas and their families. As incarnations did not restrict themselves to being (re)born into the nobility the situation developed in which limited resources were constantly circulated amongst an ever expanding group. In these circumstances it was the nobility that suffered, their land being confiscated to meet the needs of the newly reincarnated (Goldstein 1973). The British engagement with Tibetan nationalism was therefore a direct intervention into the balance of power in Tibet at a time when this recirculation of land had made the system inherently unstable.

The British engagement with Tibetan nationalism was on many levels a failure. The scale of this British intervention was highly limited in comparison with the intervention of the PRC after 1951. There are parallels to be drawn, however, with the emphasis both governments placed upon the value of secular rule. Certainly it places significant doubt upon PRC claims that current Tibetan unrest derives from the creation of this elite and distinctly secular form of nationalism in the early twentieth century. Following on from this, it must be asked how much of the continuing Sino-Tibetan conflict derives from ideological difference rather than material circumstance. This question opens up enormously complex areas of debate, and cuts to the heart of the contradictions and continuities in PRC thinking about the Tibet issue. If this question can be answered at all, and I suspect that it will resist closure, then it must involve cross-disciplinary study of an array of social and economic factors that are beyond the scope of this study. Nonetheless, ideological difference is placed squarely in the frame by the PRC's guiding principle that materialism is the route to liberation,

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<sup>98</sup> In the primary sources there are some illuminating files detailing the British attempt educate a modern Tibetan elite suitable for secular rule, see in particular IOR L/PS/10/536-540

a belief that is difficult to reconcile with the Buddhist tenet that attachment to material existence is the barrier to liberation rather than its cause. The notion that material progress will bring about the natural withering away of religion has remained a consistent touchstone of PRC policy since 1951. Significant tension has developed in relation to this for Tibetan religious activity has proved remarkably resistant to change. This raises inevitable challenges to the official party line, which has trod a contentious path between coercion and persuasion in response.

Buddhism is one of five officially recognised religions in China, these being: Buddhism, Taoism, Catholicism, Protestantism and Islam. As such it enjoys legal protections and privileges that are not afforded to faiths that fall outside of these five religions.<sup>99</sup> Buddhism has more followers than any other religion in China (Laliberté 2011:109). In recent years Chinese Buddhism has undergone a significant revival and has steadily gained political influence, particularly at the local level. The CCP has shown support for this revival, a trend linked to the fact that Chinese Buddhism provides revenue to local governments, projects an image of the PRC 'as a rising power striving toward "peaceful development"' and facilitates dialogue with Taiwan (Laliberté 2011:110). Tibetan Buddhism, however, is significantly different from mainland Chinese Buddhism. Tibetan Buddhism has remained resistant to socialist assimilation in a way in which Chinese Buddhism has not. The two traditions are philosophically different as well as historically grounded in different cultural and political institutions. Due to the perceived political threat of the Dalai Lama, religious activity in Tibet is routinely regarded as a threat to national security. Essentially, Tibetan religious activity is equated with Tibetan resistance, and is seen as more dangerous than the equivalent in the Chinese population.

This Chapter considers the development of legislation governing religious activity in the PRC. It reveals contradictions in the attempt to create a coherent body of law that outwardly projects a broad tolerance of private religious belief and the attempt to adapt religion to socialism. The state seeks to derive legitimacy from an espousal of materialistic progress that is set in contradistinction to feudalistic and backward cultural traditions. As such Tibetan religious activity is presented as an irrational

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<sup>99</sup> Religious organisations are required to register with one of five state-sanctioned patriotic religious associations. Those that do not, or cannot, affiliate with one of these associations are denied legal protection under Chinese law.

obstacle to social and economic progress. Yet, despite efforts to separate religion from politics, the PRC has become increasingly involved in the daily management of Tibetan Buddhism. The attempt to adapt religion to socialism has forced the state to engage with metaphysical and historical realities in a way that undermines its 'rule of law' rhetoric. An examination of the contradictions in official attempts to regulate religion reveals the limitations of the state's ideological commitment to modernity. This engagement also challenges the view that present day Sino-Tibetan conflict is a product of British imperial intervention. Whilst the PRC's territorial claim to Tibet can be seen as part of a defensive response to Western imperialism, this cannot adequately explain the ongoing threat that Tibetan Buddhist activity presents to the CCP.

## **8:2 Background**

Chinese policy on religion in Tibet since 1951 can be divided into five periods. Broadly speaking these reflect developments in CCP thinking on religion throughout China and are therefore not unique to ethnic Tibetan areas. However, this is not to say that there are not unique characteristics in how these policies have taken effect and in many ways it is apparent that Tibet has been treated as a special case. At times religious activity in Tibet has been subject to more liberal policy than the equivalent in the mainland, and at other times it has been subject to relatively greater coercive control.

### **1. The Seventeen Point Agreement (1951-1959)**

The first period, in particular, is unique, for it covers the period in which the Seventeen Point Agreement was in force. The pace of socialist reform was limited by Article 11, which states 'In matters relating to various reforms in Tibet, there will be no compulsion on the part of the central authorities.' The administrative reach of socialist reform was limited by Article 4 which states 'The central authorities will not alter the existing political system in Tibet. The central authorities also will not alter the established status, functions and powers of the Dalai Lama. Officials of various ranks shall hold office as usual.' Finally, the impact socialist reform had upon religion was limited by Article 7:-

The policy of freedom of religious belief laid down in the common programme of the CPPCC shall be carried out. The religious beliefs, customs and habits of the Tibetan people shall be respected and lama monasteries shall be protected. The central authorities will not effect a change in the income of the monasteries.

These provisions protected central Tibet from measures implemented in mainland China, where agricultural land belonging to Buddhist temples and monasteries was confiscated and redistributed under the Land Reform Act of June 1950 (Welch 1961:2). Thus, by 1953 agrarian land reform in the mainland was largely complete and many monks and nuns, being deprived of income, had rejoined the laity. In Tibet, meanwhile, such change had yet to begin. Indeed during this period whilst land was being confiscated from mainland monasteries, the CCP was giving alms to the monasteries of Lhasa (Shakya 1999:101).

One of the key developments of this period was the establishment of the Buddhist Association of China (CBA) in 1953. Three of the four honorary chairmen were Tibetan Buddhists, these being the Dalai Lama, the Panchen Lama and the Grand Lama of Inner Mongolia. Similarly Tibetan Buddhists of Tibetan and Mongolian origin made up nearly half of the sixty-eight monk directors. The key purpose of the CBA was to act as a bridge between the CCP and Buddhist citizens and organisations. In its present form – renamed the Buddhist Association of China (BAC) — the association retains this role today. It is the official supervisory organ of Buddhism operating under the supervision of the State Administration of Religious Affairs (SARA) department, overseen by the State Council. The high proportion of Tibetan Buddhist representatives in the association in its early days reflects the importance the CCP placed upon bringing Tibetan Buddhism into the folds of a state controlled administrative network. Unlike Chinese Buddhism, Tibetan Buddhism had developed into a highly centralised, hierarchical organisation that was directly involved in the functions of the Tibetan state. As such, the institutional organisation of Buddhism in Tibet represented a much greater challenge to the CCP than the de-centred Buddhist networks of the mainland.<sup>100</sup> The CBA was a way of constructing an alternative

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<sup>100</sup> In response to the threat of increasing secularisation in the early twentieth century Chinese Buddhists established national associations, the most important of which was the Chinese Buddhist Association. To some extent the CCP was able to utilise this

religious network under the supervision of the CCP, and the involvement of high ranking Tibetan Buddhist leaders was essential to this process.

By 1955, CCP patience for the gradualist approach was waning, and the pace of reform in the ethnically Tibetan areas of Kham and Amdo was increased, with an acceptance that this ‘must necessarily be a violent, sharp, and most complicated class struggle’ (Yeshe 6<sup>th</sup> September 1958). Mao pushed for quicker reform on the basis that backward nationalities had the potential to bypass intermediate stages of economic development and make a ‘great leap’ forward directly into socialism. The policy of encouraging gradual transformation through education was therefore dropped in favour of radical, coercive reform with the rationale that ‘one step to heaven is completely possible and necessary’ (American Consulate General 1966:35).

Despite this change in policy, reform in central Tibet remained limited. However, the violence that accompanied accelerated reform in the ethnically Tibetan areas of Kham and Amdo led to the 1956 Tibetan revolt. By 1959 this unrest had spread to central Tibet, culminating in the Lhasa Uprising of 10<sup>th</sup> March and the Dalai Lama’s flight into exile.

## 2. Democratic Reform (1959-1966)

This second period saw monasteries and religious teachers targeted and their economic and administrative power destroyed. Many monks and nuns went in to exile. In 1958, Tibet had 2,711 monasteries and a monastic population of 114, 103. According to Chinese sources by 1960 the monastic population was reduced by 84 percent to 18, 104 and there were only 370 monasteries (Ma 1998:50).<sup>101</sup>

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network after 1949 and the new Buddhist Association of China was largely established through voluntary reform of existing Chinese Buddhist Association groups in conjunction with political study groups (Ji 2008:243).

101 These figures are consistent with figures used by Tibetan-Government-in-Exile.

### 3. The Cultural Revolution 1966-1977

The Cultural Revolution led to the wholesale closure of religious institutions such as temples and monasteries throughout China. The Religious Affairs Bureau ceased to function, as did the Buddhist Association of China. In Tibet by 1976 only 800 monks and 8 monasteries remained (Ma 1998:173).

### 4. Post-Mao Reform Era 1978-1988

In the early Post-Mao period there was a considerable liberalisation of religious policy. The allocation of government funds for reconstruction led to a rapid growth in the number of monasteries and to the monastic population. By 1986 there were 234 monasteries and 6,466 monks according to Chinese sources (Ma 1998:183).<sup>102</sup>

### 5. Lhasa Unrest 1989 – Present day

On the 5th March 1989, the 30th anniversary of the 1959 Tibetan uprising, widespread riots occurred in Lhasa leading to the imposition of martial law. Set alongside the Tiananmen Square protests of June 4<sup>th</sup> and also the breakup of the Soviet Union, there was a hardening of attitudes in the government at this time (Ye 1996:79) The People's Daily reported that by 1990 there were 34, 680 monks (Ma 1998:183). In 1991, this rapid expansion was curtailed by the introduction of legal measures that imposed quotas and prohibited the further building or reconstruction of places of religious activity without government approval. A 1997 government white paper states that there are 46,000 monks and nuns in the TAR, a figure repeated in a 2003 whitepaper (Information Office of the State Council 1997, Information Office of the State Council 2003).

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<sup>102</sup> To provide some context, In 1982 Document no 6 cited the population Buddhist monks and nuns in the whole of China to be 27,000 (CCCP 1982).

### 8:3 Contemporary Constitutional Framework

Religious activities in China remain strictly controlled by the state. Religion is permitted a discrete space, delineated by law, revealing a frequently contradictory relation between private belief and the public duty that the state attaches to that belief. Thus, whilst Article 36 of the constitution guarantees the freedom of religious belief, it is a freedom that is granted only in the expectation that believers will fulfil reciprocal obligations to the socialist state.

The constitution offers a useful lens through which to view law and policy regulating religion in Tibet. The preamble states the normative framework for how religion is viewed:-

China will be in the primary stage of socialism for a long time to come. The basic task of the nation is to concentrate its effort on socialist modernisation along the road of Chinese-style socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory.

Article 1 prohibits ‘disruption of the socialist system’ by either organisations or individuals. Article 33 reminds us that an individual’s entitlement to rights entails a reciprocal obligation to ‘perform the duties prescribed by the Constitution and other laws.’ This is further backed up by Article 51, which states that citizens ‘in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.’ This is reinforced by Article 53’s exhortation that citizens ‘must abide by the Constitution and other laws, keep State secrets, protect public property, observe labour discipline and public order and respect social ethics’ and also by Article 54 which states that citizens must ‘not commit acts detrimental to the security, honour and interests of the motherland.’ Taken together, these five requirements operate as a significant counterweight to the individual freedoms guaranteed elsewhere in the document, of which freedom of religion is one.

It is also noteworthy that Article 36 is the only article in the constitution to reference religion. This would not necessarily deserve comment if it is to be accepted



that religion can be adequately dealt with as a separate individual right. Nonetheless, in a document that also deals with the group rights of minority nationalities to exercise cultural autonomy, it is interesting that religion is not mentioned again in this context. Thus, whilst Article 4 states that ‘All nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs,’ religious freedom is something that is considered in the context of the individual alone. This reflects a wider suspicion of religious activity in the public sphere, a suspicion that is explicit in Article 36’s cautious phrasing: ‘The State protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the State.’ Article 36 also expresses the view that religion has ramifications for state security, resurrecting historical comparisons with Qing hostility to Western missionaries: ‘Religious bodies and religious affairs are not subject to any foreign domination.’

To this list of duties limiting the expression of freedom should be added Article 52’s exhortation that ‘It is the duty of citizens of the People’s Republic of China to safeguard the unification of the country and the unity of all its nationalities.’ As shall be seen, religious activity in Tibet is routinely regarded as a particular threat to national unity and security. Particular emphasis is placed upon this obligation in law and policy dealing with religious activity in Tibet. Thus, we are returned to the initial difference between Tibetan Buddhism and Chinese Buddhism and also reminded that the multiple contingencies that religious activity involves raises questions about the plausibility of free floating individual rights in the absence of corresponding protection for the group.

#### **8:4      Subsidiary Legislation Governing Religious Activity**

An observation frequently made of the PRC constitution is that it lacks any corresponding mechanism of enforcement. Despite evidence of increasing citizen constitutional activism, the constitution remains an aspirational document (Hand 2008, Hand 2011, Lynch 2010). Attention must therefore be drawn to subsidiary legislation in order to consider the implementation of freedom of religion. What this reveals is a

robust core of regulation aimed at controlling religious activity. As with the constitution, emphasis is upon public order and socialist modernisation.

An important development of the past twenty-years is the adaptation of the regulation of religious activity to the 'rule of law.' Initially, however, religious activity was regulated by policy rather than specifically developed legislation. The 1982 Constitution protected 'normal' religious activities providing that they did not cause disruption to public order or interfere with the health or education of citizens (Article 36). This was reiterated in Article 11 of the Law on Regional National Autonomy (1984, 2001). Beyond this, there was little further elaboration as to what the legal parameters of 'normal' religious activity might be.

The primary source of reference for discerning where these limits were intended to fall is Document 19, 'The Basic Viewpoint and Policy on the Religious Question During Our Country's Socialist Period,' an internal party document circulated in 1982 (CCCP 1982). Document 19 laid out the basic framework for dealing with religious issue in the reform era, and argued for a level of tolerance to religious activity. This tolerance was based on two assumptions. Firstly, that religious believers could be co-opted in the work of achieving wider state goals: 'Marxism is incompatible with any theistic world view. But in terms of political action, Marxists and patriotic believers can, indeed must, form a united front in the common effort for Socialist modernization' (CCCP 1982:372).

Secondly, the party remained committed to the view that religion would inevitably wither away under socialism. Document 19 identified three basic causes for the persistence of religious belief in socialist society, these being: natural and man-made disasters, continuing class struggle, albeit now limited, and a 'complex international environment' (CCCP 1982:364). In light of these factors it was argued that the eradication of religious belief should be viewed as a gradual, if certain, process. For these reasons Document 19 cautioned against coercive attempts to wipe out religious thinking and practices. Instead, the party was called upon to show patience and reminded that: 'Religion will eventually disappear from human history. But it will disappear naturally only through the long-term development of Socialism and Communism when all objective requirements are met' (CCCP 1982:365). In

addition to this, the document acknowledged that there were potentially complex interactions and continuities between ethnic identity and religious identity and that these would have policy implications (CCCP 1982:378).

In light of this acknowledgement it might be presumed that the Regional National Autonomy Law would be the framework of choice for dealing with religious activity in ethnic areas. The previous chapter suggested that autonomy within the PRC was perhaps best seen as a method rather than a goal. This seems comparable to the approach taken to religious freedom in Document 19:-

Under socialism, the only correct fundamental way to solve the religious question lies precisely in safeguarding the freedom of religious belief. Only after the gradual development of the Socialist, economic, cultural, scientific, and technological enterprise and of a socialist civilization with its own material and spiritual values, will the type of society and level of awareness that gave rise to the existence of religion gradually disappear (CCCP 1982:383).

What is striking, however, is that legislation governing religious activity has increasingly been promulgated by the central government outside of this framework. This includes legislation specific to Tibetan Buddhism such as the Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism (2007) and the Measures for the Administration of Tibetan Buddhism Temples (2010).

This is a fairly recent phenomenon for the first laws governing religious activity in the Post-Mao era were promulgated at the regional level. This was in accordance with 1986 guidelines issued by Bureau of Religious Affairs which stated that provinces and regions should formulate local religious regulations to fit local circumstances (Yang 2008:64). Some of the first of these emerged from southern provinces such as Guangdong Province (1988) and reflect a long standing concern about interaction between the resident population and foreigners. In the case of Guangdong this concern was centred upon missionaries from nearby Hong Kong and Macao as well as foreign travellers and overseas Chinese.

The Guangdong Regulations attempted to reduce this risk by allowing the state a supervisory role over religious donations. They also required all places of religious activity to be registered and approved by the state and stipulated that religious activity must be confined to these state approved spaces. Of particular importance was the creation of a category of ‘religious professionals,’ who were to be vetted by the state before undertaking religious duties. All of these provisions occur as central features of subsequent legislation governing religious affairs in other regions, including Tibetan Autonomous Areas. This continuity would suggest that the central government retained strong influence on the law making process at the regional level, despite the fact that national level legislation on religious affairs had yet to be promulgated.

Legislation governing religious affairs in Tibet took some years to emerge and coincided with a shift in central policy that emphasised the role of ‘rule of law’ in mediating between the state and organised religion. This was expressed in the 1991 ‘Notice on Guidelines for Religious Affairs’ (Document 6). Document 6 reiterated the need to tolerate limited religious activity, but also expressed concern that ‘hostile forces beyond our borders’ were using religion to disrupt the country (CCCP and the State Council 1991:385). This, combined with reports of religion interfering with government administration, the judicial process and education in schools at the grassroots level, led to calls within the party for state action. Accordingly Document 6 recommended the speeding up of legislation governing religious affairs at both the national and the local level. The first of such regional regulations governing Tibet in the Post-Mao era was promulgated shortly after: The Interim Measures of the TAR on the Administration of Religious Affairs (1991).

These measures incorporate specific points laid out in Document 6 such as the requirement for the registration of places of religious activity, their administrative supervision, restrictions on foreign donations or foreign visitors, and state vetting of religious publications. The measures also implemented quotas of monks and nuns for places of religious activity and stipulated that applicant monks and nuns must be examined and registered, stating that ‘applicants must be patriotic and observe the law, must be devoted to their religious beliefs and must respect religious codes and temple rules.’ Within this framework the government pledged to protect ‘normal religious activities’ and extend protection to all places of registered religious activity, an

obligation consistent with Article 36 of the constitution. The measures, as with the Constitution and the Law on Regional National Autonomy, did not provide any definition of what ‘normal’ religious activity might be.

The 1991 Interim Measures represent a significant development in the state regulation of religion in the TAR. Their continuity with other regional legislation reflects the fact that the TAR regulations followed central party directives. Yet despite the primacy of the central government at the level of policy, these regional regulations were the primary legal mechanism for regulating religious activity in the region. At the time the measures came into force there was no superior national legislation governing religious affairs. As such, the 1991 Measures operated within the basic framework of the Law of Regional National Autonomy, under which they gained authority as per the Constitution. The retention of the central government’s control on policy shows that the regional measures did not signify a devolved approach to religious affairs legislation. However, the regional nature of the law making process placed these Interim Measures in close proximity to other legislation governing Tibetan ethnic autonomy. At a basic level, despite the lack of Tibetan autonomy in the formulation of religious policy, this legal framework reinforced the very close association between ethnic and religious identity in Tibet.

This framework has undergone significant change in the twenty-first century, particularly since the State Council’s Regulations on Religious Affairs came into effect in 2005. This is not to say that promulgation of regional regulations on religious affairs has ceased. On the contrary, in 2006 the TAR formulated its own regionally specific Implementing Measures for the Regulation on Religious Affairs (Trial Measures 2007). These measures are comparatively important in that they implement stricter provisions than either the overarching State Council regulations or many of their mainland provincial equivalents. For example, Tong looked at mainland provincial provisions enacted after the State Council’s Regulations on Religious Affairs came into force and compared them with both previous provisions in these provinces and the new central regulations. He concluded that:-

In both statutory enactment as well as policy implementation, and at both the central and provincial levels, the overall trend has been one of the increasing institutional autonomy of religious organizations, greater protection

of religious organizations, venues and personnel. Even for the more authoritarian provinces, no retrogression towards greater restriction on religious freedom is evident either in the legislative stipulations or policy enforcement of its new provincial regulations (Tong 2006:7).

This has not been the case in Tibetan Autonomous Areas, where provisions have become comparatively stricter. In addition there has been a fundamental change in the legislative structure, for local level legislation in Tibetan Autonomous Areas has become incorporated into a superstructure of law governing religion within the PRC as a whole. This serves to distance religious affairs legislation from the regional autonomy framework. The fact that the 2007 TAR Implementing Measures bucked the trend of liberalisation identified by Tong is not incidental to this process. This distancing of religious issues from other features of Tibetan ethnic identity is a key strategy of state regulation of religious activity within Tibetan areas and the development of national legislation on religious affairs has strengthened this dynamic.

What is particularly interesting is that the development of central legislation on religious affairs should ostensibly have bought consistency to religious regulations throughout the PRC. Indeed this is implicit in the government's pronouncements on such legislative development and is in keeping with the requirements of the Legislation Law (2000) which addresses conflict of laws. Yet contrary to this, the regulation of religious affairs in Tibetan Autonomous Areas has departed from general practice. These departures are significant and raise questions about the nature of the central governments attempts to develop a coherent body of law governing religion. This should be considered alongside two pieces of legislation promulgated by SARA and the State Secrets Protection Bureau which stipulated that government analysis, policy and measures related to ethnic and religious affairs must be classified as top-secret (Regulations on State Secrets and Specific Classification Limits in Religious Affairs Work (1995), Regulations on the Specific Scope of State Secrets and Classification of Ethnic Work (1995)).<sup>103</sup> The use of local level legislation to enforce stricter provisions in Tibetan Areas raises some challenge to the principles of coherency, predictability and equality necessary to such a framework. The sanctioning of a hidden sphere of

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<sup>103</sup> See also HRW 2005:6

law and policy at the local level significantly adds to this challenge and suggests that the public face of the central law does not reflect legal reality in Tibetan areas.

To elucidate this process it is first necessary to summarise the bureaucratic framework within which religious affairs are regulated. It is then necessary to examine in what ways the TAR Implementing Measures enforce stricter regulation of religion than the State Council's Regulation on Religious Affairs. Finally, consideration will be given to other legislative developments that impact upon religious activity in Tibetan areas. The intention here is not to document every piece of legislation governing religious affairs in Tibetan Autonomous Areas, but to discuss certain issues that inform such legislative development generally. With this in mind, the discussion will focus upon the 2007 State Religious Affairs Bureau Order Number 5 'Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism' (MMR).

The Regulations on Religious Affairs were the first comprehensive regulations of their kind to be issued by the central government.<sup>104</sup> Originating from the State Council rather than the National People's Congress, the regulations fall in the legislative class of administrative measures rather than national law. It is possible that this reflects a government desire to retain more flexibility in regards to future amendments, particularly given the sensitive nature of the measures (Bays 2005). Perhaps more significant, however, is that the State Council directly oversees the SARA, which is the department responsible for supervising the five state recognised religious organisations within China.<sup>105</sup> Within this capacity SARA has extensive control over religious affairs including the selection of clergy, the interpretation of religious doctrine and the administration of annual inspections of religious venues. The State Council is therefore uniquely positioned as a legislative unit when it comes to dealing with religious matters.

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104 It should be noted that in 1994 the Religious Affairs Bureau and State Council issued three separate regulations: The Regulations on the Supervision of the Religious Activities of Foreigners in China, the Registration Procedures for Venues for Religious Activities and the Regulations Regarding the Management of Places of Religious Activities.

105 The Buddhist Association of China, Chinese Taoist Association, Islamic Association of China, Three-Self Patriotic Movement and Chinese Patriotic Catholic Association.

The State Council sits at the apex of an extensive bureaucratic network that involves the state in all aspects of religious activity down to the grassroots level.<sup>106</sup> In the case of Tibet it is the regional offices of SARA that undertakes the most important policy work. Most Tibetan centres of religious activity are supervised by local county or municipal branches of SARA. This is a departure from practice in other areas where more duties are devolved to provincial branches of the five Patriotic Religious Organisations, which for Buddhists would mean supervision by the Buddhist Association of China. As noted earlier in this chapter, in the mainland the Buddhist Association of China developed a close working relationship with political study groups, which strengthened its function as a bridge between the party and Buddhist citizens. The reduced role that the BAC plays in Tibet suggests a lack of confidence about its ability to function in this capacity in Tibetan areas. This administrative structure places religious institutions in Tibet under more direct government supervision than religious institutions elsewhere in China. This has potential relevance to the law making process for SARA has powers to issue legislation at the level of administrative measures.

The most significant bridge between the government and Buddhists in Tibet has historically been the Democratic Management Committees (DMCs) set up within all monasteries and nunneries. These committees are not unique to Tibetan areas, and the recent 2005 State Council Regulations on Religious Affairs make their establishment mandatory for all sites of religious activity in the PRC (Article 17). In Tibet DMC's were established during the democratic reforms that took place after the 1959 Tibetan uprising (Shakya 1999:272, McCoquodale and Orosz 1994:208). DMCs replaced the existing hierarchy within Tibetan religious institutions with elected management bodies charged with administering funds and property. The government has placed great importance upon the role of DMC's in 'abolishing theocracy, separating religion from state, and protecting religious freedom.' (Information Office of the State Council 2009). Appointments are overseen by SARA and candidates are vetted to ensure that political credentials are met (Cabezón 2008:273). DMC's have a critical role in policy implementation. They also serve as a conduit of information to

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<sup>106</sup> The State Council itself receives policy instructions from the highest level of the CCP, such as the Standing Committee of the Politburo (Cabezón. 2008:272, Spiegel 2000:6).



government departments and therefore have an equally important role in policy formulation.

#### 8.4.1 *The Religious Affairs Regulations*

The State Council's Religious Affairs Regulations are the product of a six year drafting process that involved extensive consultation and research. Comprising 48 articles the Regulations implement provisions on the establishment of religious organisations, the management and registration of religious personnel, venues and property and the legal liability of both state and religious bodies. The regulations allow for extensive state involvement in the religious activities of its citizens. There is a general requirement for collective religious activities to be held at registered religious sites and for them to be presided over by registered religious personnel (Article 12). Religious organisations must be registered (Article 6). Religious sites must accept supervision and inspection by the religious affairs department (Article 19) and 'other relevant departments of the local people's government' (Article 18). Religious sites have a legal requirement to both prevent and report any occurrence that 'disrupts the unity of all nationalities or impairs social stability' (Article 22). New religious sites cannot be constructed without approval and must show that there is a local need for such a venue and that it is 'rationally located' (Article 13 and 14). Religious personnel must be 'determined qualified as such by a religious body' (Article 27). Large scale religious activities must obtain prior approval (Article 22).

Within these limits, religious activity is given a level of state protection. For example, land or sites legally used by religious bodies are protected by law, as are the cultural relics possessed or used by a religious group (Article 30 and Article 33). Qualified religious personnel have a legal right to preside over religious duties, conduct religious ceremonies, sort out religious scriptures and pursue religious research (Article 29). Religious bodies are allowed to accept donations from 'home or abroad' —a right explicitly denied in previous local regulations (Article 35). Of further note is the right given to religious bodies and sites to 'operate public undertakings' which leaves open their possible engagement with social welfare projects such as hospitals and care centres. Finally, religious groups and individuals have the right to appeal administrative acts carried out by the religious affairs department (Article 46), a

right which is backed up by explicit provisions that punish administrative abuse or negligence (Article 38). The regulations also outline civil and criminal liability for infringement upon ‘the lawful rights and interests of a religious body, site for religious activities or a religious citizen’ (Article 39).

In summary, the regulations do not signify a ground breaking shift in the government’s approach to regulating religious activity in the post-Mao era. They do, however, bring more clarity and predictability to existing registration procedures and articulate a subdued acceptance of religious activity, albeit within closely supervised spaces. Yet this consistency is undercut by a continuing lack of definition as to what constitutes ‘normal’ religious activity. There remains a shadowy realm of potentially illegal religious activity. Religious groups that do not belong to any of the five state authorised religions fall into this realm. In addition, Article 300 of the Criminal Law (1997) criminalises ‘Whoever organizes and utilizes superstitious sects, secret societies, and evil religious organizations or sabotages the implementation of the state’s laws and executive regulations by utilizing superstition.’ This provision was reinforced by the 1999 Decision of the Standing Committee of the National People’s Congress on Banning Heretical Cult Organizations, Preventing and Punishing Cult Activities and also by the explanations of the Supreme People’s Court and Supreme People’s Procuratorate on China’s Law on Heretical Cults, issued the same year. However, it is not only cults and sects that may fall foul of government constraints on religious abnormality. The five ostensibly ‘normal’ religions also have to maintain theological standards which meet government requirements.

#### 8.4.2 *The TAR Implementing Measures*

The TAR Implementing Measures follow the basic template of the State Council’s Regulations. It is clear that the State Council’s regulations are drafted in such a fashion that government departments retain a considerable amount of discretionary control over who can practice religion and where and how they can do so. The stricter provisions within the TAR Measures therefore send quite a clear message about how this discretion should be applied in Tibetan areas.

The TAR provisions which depart from the State Council regulations fall into two broad categories. Firstly there is a group of provisions that add regionally specific controls. This includes three provisions that outline the procedures governing the succession of religious teachers through reincarnation (Article 36, 37 and 38). There is also a specific ban on re-establishing, or re-establishing in disguised form, ‘previously abolished feudal privileges.’ This encompasses the traditional *labrang* system, under which reincarnations of lamas received estates, and the hierarchical relationship between monasteries (Article 6).

The second category of provisions qualifies the Standing Council Regulations with additional restrictions and requirements. For example, the Standing Council regulations give religious organisations the right to publish religious publications for internal use (Article 7). Article 11 of TAR Implementing Measures qualifies this right by requiring religious sites and organisations setting up a ‘printing house’ to obtain prior approval from both the religious affairs department (at the regional level) and the news publication department. Religious personnel are also subject to greater restriction under the TAR measures. Article 33 stipulates that, with the exception of simple religious ceremonies at open air burials or in citizen’s homes:-

religious personnel may not carry out such activities as initiations into monkhood or nunhood, consecrations, expounding Buddhist sutras, proselytizing, or cultivating followers outside of venues for religious activities, if they have not received approval from the people’s government religious affairs department at the county level or above.

Article 34, meanwhile, provides for the state censorship of religious materials by stipulating that religious followers may not ask religious personnel to recite from banned religious texts. It also creates an obligation for religious personnel and citizens to take on the role of the censor by stipulating that they ‘may not “disseminate and view” [chuankan] books, pictures, and materials that disrupt ethnic unity or endanger national security.’ There is no further elaboration on what such unlawful materials might be, potentially creating a presumption that the individual has liability for recognising such material and acting upon that knowledge.

Article 34 reflects an ideological standpoint that informs government law and policy on religious issues generally, which is that loyalty to the socialist state takes precedence over religious belief. This is built into constitutional framework of corresponding rights and duties and is also fundamental to the government's exhortation that religion must adapt to socialism. This requirement of adaptation is far reaching in effect, and absolutely integral to the legislative process.

This was implicit in the directives issued to the National United Front Work Conference by President Jiang Zemin in November 1993. These specified three key aspects to the handling of religion in China: correct implementation of the Party's policy toward religion; strengthening the administration of religious affairs according to law and actively guiding religion to adapt to socialist society (Ye 1996:98, Goosseart and Palmer 2008:326). A 1996 article in a party journal went further by identifying theological implications to such adaptation: 'By religion adapting itself to the socialist society, we mean that with the establishment of the socialist society, religion must adjust itself with corresponding changes in theology, conception, and organization' (Luo 1996:103). In the same year, Ye Xiaowen, then director of the Bureau of Religious Affairs of the State Council, argued that Jiang Zemin's three phases represented 'the crystallization of the integration of the Marxist view of religion with the actual conditions in Chinese religion' (Ye 1996:99). He also explicitly linked the development of legislation on religious issues with the goal of adaptation:-

The law and regulations governing religion represent the institutionalization and codification of the policy toward religion. Administration according to law is coercive in nature. The purpose of all-around correct implementation of the policy toward religion, and of strengthening the administration of religious affairs according to law is actively to guide the religions to adapt themselves to the socialist society (Ye 1996:99).

The requirement of adaptation has played a critical role in law and policy in Tibetan areas. It is key to understanding the stricter controls on Tibetan religious activity and the ways in which these controls operate beyond the established framework of regional national autonomy law. In the TAR Implementing Measures this requirement gives rise to the legal obligation for:-

All levels of the people's government shall actively guide religious organizations, venues for religious activities, and religious personnel in a love of the country and of religion, in protecting the country and benefiting the people, in uniting and moving forward, and in guiding the mutual adaptation of religion and socialism (Article 5).

There is no such provision in the State Council regulations and whilst party policy on adaptation may provide a general backdrop for legislative development throughout the entirety of the PRC, its specific implementation in Tibetan areas is quite distinctive. Such distinctiveness in policy implementation in Tibetan areas is not a new phenomenon. It has been a feature of previous government campaigns such as the Strike Hard campaign, for example. This was launched nationally to target 'extreme violent crime, gun and gang crime, telecom fraud, human trafficking, robbery, prostitution, gambling and drugs' (Jin 2010). However, in Tibetan areas the campaign was first launched in monasteries and had an explicitly political character, focussing upon cracking down upon 'splittism' and combating the 'Dalai clique' (TIN 1998, TIN and HRW 1996). The implementation of religious regulations follows a similar pattern. It also raises some unique problems.

### **8.5 Problems Arising From the Unique Implementation of National Policy in Tibetan Areas**

A primary problem faced by the government is that the discriminatory treatment of Tibetan Buddhism potentially conflicts with China's international obligations. The government has signalled that it is preparing to ratify the International Covenant of Civil and Political Rights and in 2011 undertook judicial and legislative amendments to ensure compliance (China Daily 14<sup>th</sup> July 2011). The ICCPR seeks protection for three key freedoms in relation to religious belief. Firstly, the freedom to have or adopt a religion of the individual's choice (Article 18), Secondly, the freedom to manifest this religion in private or in public, individually or communally (Article 18 and Article 27) and thirdly the right to be free from discrimination on religious grounds (Article 26). There are multiple areas of conflict between these obligations and Chinese law. For example, Article 18 stipulates that 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children

in conformity with their own convictions.’ However, China enforces a strict separation of religion and education (Education Law 1995, Article 8), and has imposed specific limits on the study of Tibetan Buddhist texts (Measures for the Administration of Tibetan Buddhism Temples 2010). These include restricting study classes to over-18’s who have met political criteria, restricting freedom to travel to classes in other areas, and the banning of lay practitioners from attendance of study classes (Article 27 and Article 29). Students in Tibetan universities and colleges are explicitly barred from participating in religious activities, and so too are Tibetan monks and nuns banned from entering university grounds and other public buildings.<sup>107</sup> Similar discriminatory policies ban religious adherents from being members of the CCP.

The state’s role in censoring religious materials and deciding what constitutes ‘normal’ religion is another area of conflict, as is the mandatory requirement that religious bodies are affiliated to state nominated religious associations who control the financial, administrative and theological affairs of such bodies.

It is doubtful that the ICCPR’s list of acceptable derogations is broad enough to cover the extensive restrictions on religious freedom found in Chinese law. Certainly the government in legislating on religious matters has committed itself to regulating religion according to law, fulfilling the first part of the ICCPR’s derogation clause:-

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

However, the enforcement of strict quotas in monasteries, restrictions on religious personnel’s freedom of movement and the requirement that they first meet political criteria move beyond standard maintenance of public health and safety, particularly when placed within the broader context concerning adaptation to socialist, atheist society.

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<sup>107</sup> ‘Party members, state employees and students, all of them, are not allowed to participate in religious activities such as Sagadwa [annual circumambulation of the old city centre and Potala Palace] and so forth.’ Annual Order of the TAR Discipline Committee and the TAR Supervision Department 2012 (Barnett 2012:84).

The problem of the PRC's compliance with the ICCPR is even more critical in relation to Article 27 which extends further protection to minorities by stipulating that 'minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' This suggests that minorities should be afforded additional state protection in relation to their religious freedom and, unlike Article 18, Article 27 lacks a derogation clause. This makes the instances of stricter implementation of religious regulations in Tibetan Autonomous Areas particularly problematic. Some of the differences in legislation have already been discussed, but to cite a specific example of how this applies: in 1996 the Buddhist Association of China issued an order banning photographs of the Dalai Lama in Tibetan areas; from this date onwards there have been numerous reports of detention and beatings of Tibetans – especially monks and nuns—caught in possession of such photos.<sup>108</sup> However, in the mainland, photos of the Dalai Lama have remained in circulation via state media.<sup>109</sup>

Compliance with Article 27 does not demand a system of regional autonomy. Nonetheless, the move to shift religious regulations away from the framework of Regional National Autonomy raises questions about the government's commitment to enforcing the rights articulated by Article 27. This is compounded by the discriminatory elements of policy implementation mentioned above. Nonetheless, compliance with the ICCPR is not the only problem created by such policy, nor arguably the most critical. After all, China has continually argued that the particular situation in Tibet is a matter of national security rather than the freedom of religion. Ye Xiaowen, director of SARA from 1995 to 2009, made this argument in 1996 at the start of the Strike Hard campaign in Tibet:-

Our struggle against the splittist Dalai [Lama] clique over the Tibetan question is in essence not a matter of whether there should be religious belief or whether there should be autonomy, but whether there should be stability or disorder in Tibet; a matter of safeguarding the unification or dividing the motherland, of upholding the dignity of national sovereignty or interfering in China's internal affairs in collusion with hostile foreign forces (Ye 1996:87).

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<sup>108</sup> I received a first-hand account from a participant in such an incident (UNCR Refugee Reception Centre, Kathmandu 1999). See also Barnett (2011).

<sup>109</sup> This is discussed in Barnett 2011:80. For examples see [huanqiu.com](http://huanqiu.com) 2012.

In the context of the global war on terror, China has gained a degree of latitude. There remains some indeterminacy over what derogations ‘are necessary to protect public safety, order, health, or morals,’ and the government’s campaign against ‘the use of religion by the dark forces’ has achieved some legitimacy through China’s significant role in international counter-terrorism (Ye 1996:97, HRIC 2011).

There is a second, critical, problem created by the discriminatory implementation of religious regulations in Tibetan Autonomous Areas. This is that such policy creates inconsistencies and contradictions within the Chinese legal system. A recent development illustrates this point. In late 2011 the government began establishing direct rule over all monasteries in Tibetan areas. Under the new policy for the ‘Complete Long-term Management Mechanism for Tibetan Buddhist Monasteries’ unelected, government or party officials have been permanently stationed inside monasteries. In some Tibetan Autonomous Areas officials directly supervise existing DMCs. In the TAR the system requires new unelected Management Committees who have authority over DMCs. Depending upon the size of the institution this can mean up to thirty lay officials being stationed to supervise both religious and administrative affairs (HRW 2011). This is a significant shift away from a long-standing policy of monastic self-management. The existing system of Democratic Management Committees, still in place in mainland China, followed the principle that religious institutions were best run internally by religious personnel, with the government taking on a supervisory role. Such supervision can be extensive: the selection process of candidates is controlled by the government and party officials, and committee members have to meet political requirements (Cabezón 2008:273). Yet despite these significant limitations DMCs are elected members of the local community. Permanently stationing unelected officials inside monasteries marks a clear break from established practice.

There are direct local implications to this policy. The change in approach was a response to the 2008 unrest in Tibetan areas which has been followed by a number of self-immolations. Monasteries are regarded as a significant source of unrest. Evidence suggests that previous government crack downs within monasteries have escalated, rather than reduced, tensions and sources indicate that the recent self-immolations are



protests against increasing state control (Barnett 2011, CECC 2012). However, there are also broader national implications.

The introduction of direct rule in Tibetan monasteries raises several contradictions. As touched upon above such policy undermines the framework of Regional National Autonomy. The central government has attempted to legitimise the separation of religious and ethnic identity by arguing that:

Religion and nationalism are two different categories. Religion has never been a prerequisite for the formation of a nation, nor does it constitute a basic characteristic of a nation. The two should not be mixed up (Ye 1996:85).

Accordingly the central government has attempted to link religious belief to the performance of patriotic duties to the state: 'To love religion, you must first love your country' (CECC 2009:33). Ultimately, this process implies the disconnection of religious culture from ethnic culture and it is on this basis that adaptation to socialist society becomes possible.

The challenge raised to Regional National Autonomy is only one problem. There are also considerable contradictions in the state increasing its direct involvement in Tibetan religious affairs. Firstly, such policy runs counter to the sentiments expressed in Documents 6 and 19, which argued very strongly that coercive policy drives religion underground and ultimately strengthens its social base. Document 19 in particular stated that religious belief no longer represented an antagonistic challenge to religion (Barnett 2011:57, CCCP 1982). Document 19 did not simply represent an ideological shift; it had practical political consequences. The policy of allowing a certain measure of social and economic autonomy, or 'zones of indifference,' was a means for the Post-Mao government to assert regime legitimacy by providing a basis for popular support. If, as Potter (2003:318) argues, 'Religion represents a fault line of sorts in the regime's effort to build legitimacy through social policy,' then the increasingly coercive approach in Tibetan areas weakens the government's claim to legitimacy on these grounds. By separating religious regulations from the framework of Regional National Autonomy the government has been able to increase its direct control over religious activity in Tibet. The problem is that this has not entirely

removed the contradiction between state control and social autonomy. That contradiction still exists in the wider context of the Post-Mao Chinese state. This has not insignificant implications given that the government has already faced internal criticism of its persecution of a wide range of religious groups, some of which originated from whistleblowers within the Ministry of State Security (Fu 2003:4).

## **8.6 Managing Religion According to Law**

One particular way in which the government has sought to minimise such contradiction is by strengthening the 'rule of law' in managing religious affairs. After the 3<sup>rd</sup> Forum officials began denouncing the Dalai Lama as a religious leader by arguing that his teachings were heretical and that he was involved in international terrorism (Chen 1996a:3). Previously official reform-era criticism focussed upon the Dalai Lama's political role, leaving his religious role untouched. As a result of this change in emphasis Tibetan Buddhist activity became increasingly represented as an antagonistic challenge to socialist society:-

In the spiritual realm, in particular, the masses would not be heading towards socialism if they fully accepted the guidance of religion. Because of their religious belief, many people are following the Dalai Lama in splitting the motherland and doing what is endangering socialism (Chen 1996b:55).

The 3<sup>rd</sup> Forum explicitly utilised the language of the revolution to put forward this point. In the general context of reform-era politics the return to ultra leftist justifications of coercive policy was both conspicuous and inconsistent:-

The struggle between ourselves and the Dalai clique is not a matter of religious belief nor a matter of the question of autonomy, it is a matter of securing the unity of our country and opposing splittism. It is a matter of antagonistic contradiction with the enemy, and it represents the concentrated form of the class struggle in Tibet at the present time. This struggle is the continuing struggle between ourselves and the imperialists since they invaded Tibet a hundred years ago (Ragdi 1994:156).

This language was increasingly replaced by the language of the rule of law. Shortly after the 3<sup>rd</sup> Forum took place the government launched an extensive re-education campaign to ‘enhance the knowledge of the monks and nuns about patriotism and law’ (TIN and HRW 1996:28). This involved work teams being sent to each monastery and temple in the TAR, and to monasteries in other Tibetan Autonomous Areas, over a three year period. These teams were directly supervised by the CCP rather than SARA and oversaw compulsory daily study sessions covering history, law, religious policy and politics. After three months monks and nuns were required to sit a written examination, and if successful were issued official permits allowing them to remain at their institution (The Patriotic Education Programme Work Team in Yardoe, Nedong County 1997, TIN 1998:35). The study sessions resulted in numerous expulsions followed by protests and arrests (TIN 1998:44-45).

The syllabus placed considerable emphasis upon various aspects of the Chinese legal system, including the nature and scope of constitutional rights governing freedom of religious belief and how this applied to monasteries. Integral to this legal education was the insistence that certain features of Tibetan Buddhist teaching were inauthentic and by extension unlawful. The assertion in the study materials that the Dalai Lama was not a genuine Buddhist is a specific example of this: ‘the Dalai’s actions are totally contradictory to the basic codes of conduct applicable to a Buddhist’ (GOPPE 1996b:10). Beyond this, the re-education process also involved a much wider reinterpretation of Tibetan Buddhism that has profound implications to Tibetan Buddhist philosophy, and indeed Buddhism generally.

In recent years the Dalai Lama has given philosophical teachings, particularly on the Buddhist principle of Universal Responsibility, which contribute to what Cabezón has called the ‘Tibetan political philosophy of liberation’ (Cabezón 1996:133). The Patriotic Education study books criticise such political engagement and state that it contradicts ‘the principles of the separation of religion and politics as espoused by Lord Buddha’ (GOPPE 1996b:12). The study materials suggest that authentic Buddhist practice cannot engage in politics on the basis that ‘Shakyamuni, the founder of Buddhism, voluntarily renounced his kingdom to seek enlightenment’ (GOPPE 1996b:12). By logical extension this argument also suggests that the traditional Tibetan system of law and governance was founded upon a heresy because

it failed to adequately separate the domains of worldly existence from the realm of other-worldly spiritual pursuits.

As well as being a remarkably unequivocal and reductive interpretation of Buddhist philosophy this argument undermines official attempts to present the state control of Tibetan Buddhism as a matter secular administration. It is fundamentally self-contradictory for the CCP to advocate the separation of religion and politics on the one hand, yet on the other hand to directly engage in the interpretation of Buddhist doctrine. The Patriotic Education campaign remains a central feature of official policy in Tibet, and has continued to seek legitimacy from its emphasis upon regulating religion according to the law. Recent campaigns have specifically been styled as legal education drives designed to increase the legal awareness of monks and nuns in order to ensure the normal practice of Buddhism (Xinhua 9th March 2009, Global Times 13th March 2013) This explicit engagement of law as an educative tool in Tibetan religious institutions is a practical application of the party's view that 'strengthening the administration of religious affairs according to law is actively to guide the religions to adapt themselves to the socialist society' (Ye 1996:99).

Since Document 19 official policy has sought to project a broad tolerance of individual religious belief and adopted the attitude that atheist materialism will prove an irresistible civilising influence. The development of legal strategies to distinguish between lawful and unlawful religious activity has allowed the government to distance itself from explicitly coercive attempts to eradicate religious belief. Yet by demanding that 'Religious tenets and practices which do not comply with a socialist society should be changed,' the party has shown a willingness to coercively alter the foundations of religious thought (TIN 1996:28).

To summarise, it is clear from official statements that the separation of religious and ethnic identity is a considered government strategy and that this strategy forms the basis of actual policy development. It is also apparent that this has resulted in a bifurcated state policy on religion, wherein Tibetan Buddhism is subject to direct state management in contrast to a general advocacy of religious self-management. This contradicts the well publicised position on religion adopted in the reform era. The problems such a policy poses to the exercise of Regional National Autonomy are

significant, particularly in light of the commitment that China has made to ratify the ICCPR. Beyond this, there is the question of whether the contradictions raised by such policy have significance in the wider legal context of the PRC.

One of the ways that the government has sought to reconcile such contradictions is through an emphasis upon the regulation of religion according to the law. The use of more coercive controls in Tibet has been justified as a necessary response to unlawful behaviour. The government's denouncement of the Dalai Lama as a religious leader forms part of this response. By linking the Dalai Lama to international terrorism the government has sought to educate citizens to accept coercive controls in Tibetan areas as a matter of state security rather than as a religious issue. A second way in which the government has sought to legitimise direct state intervention in Tibetan Buddhism is through reference to historical tradition. This involves the (re)construction of both legal and religious roles.

### **8.7 The Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism**

There is some continuity in modern day regulation of religion and historical restrictions upon religion in the Qing dynasty. As argued by Goosaert and Palmer (2010:36) the development of an anticlerical discourse 'prefigured secularist religious modernity by condemning clerical institutions and rituals while valorizing individual spiritual practise.' This continuity is not insignificant and suggests that caution is necessary when assessing the changes that have occurred in post-revolution China. Profound as these changes are they nonetheless have historical precedent. Care must be taken, however, when discussing such continuity in the case of Tibet. As discussed in Chapter two, the image of the Qing Court as the unequivocal, pure Sinic centre from which the civilising influence of Confucian culture radiated has given way to an image of the Qing empire as 'a confederation of discreet, culturally distinct blocks' (Berger 2003:9). It is therefore important to remain sensitive to the anomalous aspects of Qing engagements with Tibetan political and religious institutions. One of the arguments made in Chapter Two was that passing over such historical anomalies reduces the visibility of modern day social and cultural change in Tibet by obscuring

aspects of traditional Tibetan law and governance. It also reduces the visibility of how historical narrative is constructed and used by the modern Chinese state to bolster regime legitimacy.

The latter, is explicitly brought to bear in the 2007 State Religious Affairs Bureau Order Number 5 Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism (MMR). This provides the legal framework for state intervention in the process of reincarnation. This marks a significant departure from previous practice in the PRC, but the central government has presented these measures as a continuation of traditional methods of intervention established in the Qing dynasty. The measures therefore have dual significance, both as a component in an expanding contemporary legal framework aimed at regulating Tibetan identity and as part of a historical narrative.

The 2007 measures are the most comprehensive set of regulations for registering and approving reincarnations yet to be issued in the PRC.<sup>110</sup> In the post-Mao era the state has shown itself increasingly willing to directly engage with reincarnation matters through national and regional level legislation. This engagement takes place within the constitutional framework that guarantees freedom of religion. By referring to this wider framework, subsidiary legislation dealing with reincarnation therefore remains consistent with general policy, despite the apparent oddity of an atheist government legislating on such matters.

The Constitution protects the right to believe or not to believe in religion (Article 36), and the rationale for state management of reincarnation is that careful regulation protects wider social harmony, within which the freedom of religion operates. Hence Article 3 of the Regulation of Religious Affairs places importance upon the duty to ‘safeguard unification of the country’ and states that: ‘No organization or individual may make use of religion to engage in activities that disrupt public order, impair health of citizens or interfere with the educational system of the State, or in other activities that harm State or public interests, or citizens' lawful rights

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<sup>110</sup> The MMR was preceded by an obscure piece of legislation enacted by the TAR People's Congress in 1995, The Detailed Rule on the Reincarnation of the Living Buddha. This coincided with the controversial detention of the newly reincarnated 11th Panchen Lama. Whilst reported on by the official state news agency Xinhua, the contents of this regulation were never made public (HRW 1997:49).

and interests.’ The Implementing Measures of the Tibetan Autonomous Region on Religious Affairs (2006) expand upon this by exhorting government departments to ‘actively lead’ religious organisations, venues and personnel ‘to be patriotic, protect the state and be beneficial to the people, further unity and guide religion to be appropriate for a socialist society’ (Article 5). Within this framework it is not necessary for the state to believe in the reality of reincarnation; it is only necessary that the state regulates reincarnation in a manner consistent with the fact that some of its citizens do. Nonetheless, the act of bringing the law to bear upon a metaphysical event gives rise to contradiction and paradox.

The measures have been formulated in accordance with Article 27 of the State Council’s Regulations on Religious Affairs which laid the ground for legal intervention in reincarnation matters by stating that ‘the succession of living Buddhas in Tibetan Buddhism shall be conducted under the guidance of Buddhist bodies and in accordance with the religious rites and rituals and historical conventions.’ Article 27 also requires that successors be approved by the Religious Affairs Department of the People’s Government at or above the municipal level. The TAR Implementing Measures repeat these requirements with added provisions stipulating that venues for religious activity should plan for the education and management of resident reincarnated living Buddhas (Articles 36-40).

The MMR extends the requirement for approval in three significant ways. Firstly, the system of approval by the lowest levels of government is replaced with a new hierarchical approval process that stretches to the uppermost levels of government. Secondly, the MMR outlines specific conditions that have to be met by both the reincarnating living Buddha and the institution to which it is associated. Thirdly, the MMR widens the jurisdiction of the law into new metaphysical territory by imposing conditions on living Buddhas throughout the reincarnation process.

The primary conditions to be met before an application for reincarnation is successful are laid out in Article 2. These include the requirement that the reincarnating living Buddha ‘should respect and protect the principles of the unification of the state, protecting the unity of the minorities, protecting religious concord and social harmony, and protecting the normal order of Tibetan Buddhism.’

Article 2 also stipulates that ‘reincarnating living Buddhas shall not be interfered with or be under the dominion of any foreign organisation or individual.’

Each application for a living Buddha reincarnation now requires examination and approval by the provincial or autonomous regional people’s government religious affairs department. Living Buddhas with a ‘relatively large impact’ must be approved by the provincial or autonomous regional people’s government; those with a ‘great impact’ must be approved by the SARA, and those with ‘a particularly great impact’ must be approved by the State Council (Article 5). Approval requires that living Buddhas be of a historically verified lineage and that they be registered at an authorised place of religious activity that has the ability to train and raise living Buddhas (Article 3). Reincarnation rights are not guaranteed and local governments at city-level and above retain the right to prohibit reincarnations from occurring in delineated districts (Article 4).

The law requires that applications for reincarnation be made on behalf of the living Buddha by ‘a majority of local religious believers and the monastery management organisation’ (Article 3). Once this initial application has been approved an authorised search team is established to search for the ‘soul child’ (Article 7). When identified, the living Buddha must be approved by the same level of government that oversaw the search application (Article 9). If approved, the living Buddha is issued with a living Buddha permit by the China Buddhist Association and registered by the SARA (Article 10). The state retains the right to supervise the training of the living Buddha after he or she has been installed, and requires training plans to be submitted for approval to the local Buddhist Association (Article 12).

Enforcement of the MMR is to be carried out in accordance with the administrative sanctions laid out in Regulations on Religious Affairs, which Article 11 of the MMR makes applicable to individuals and units who contravene the MMR or who ‘without authority carry out living Buddha reincarnation affairs.’ Due to their potential impact upon individual livelihood and institutional existence these sanctions whilst classified as administrative are significant, providing for the possible confiscation and demolition of property associated with religious organisations and the disqualification of religious personnel (Regulations on Religious Affairs Articles 40,



41, 43 and 45). In addition, the MMR stipulates a specific punishment applicable to incarnations ‘who send secret reports or collude with foreign separatists, assist in disturbances, tolerate them, or incite others,’ which is that they ‘will be stripped of the right to hold the incarnation lineage’ (Article 12).

## **8.8 The MMR in Historical Perspective**

The contradiction of an atheist party maintaining control of the reincarnation process is striking. However, the government takes particular care to place this approval process in a historical context that invokes legitimacy through reference to customary practice. In particular it presents the measures as a continuation of legal methods for ascertaining high ranking Tibetan incarnations in the Qing dynasty. This too is contradictory and also anachronistic, being a self-conscious revival of imperial policy by a party that campaigned against excesses of traditional feudalism. Yet, this is perhaps the lesser contradiction, slotting expediently into a pre-existing narrative of Chinese control in Tibet. Moreover, by opening this narrative up to a revisionist legal interpretation, the expansion of state control over religion in Tibet is presented as part of the development of the rule of law. Even, it seems, a necessary component of the protection of religious freedom in modern society.

There has been one exceptional instance in which the PRC state has directly intervened in the recognition process of incarnations, and that occurred in 1995 in the case of the 11<sup>th</sup> Panchen Lama. The intervention occurred in response to the 14<sup>th</sup> Dalai Lama’s recognition of the young Tibetan boy Gendun Choekyi Nyima as the reincarnation of the recently deceased 10<sup>th</sup> Panchen Lama. PRC authorities placed the boy, his family and many of those involved into protective custody and announced their own candidate, Gyalsen Norbu. Neither Gendun Choekyi Nyima nor his family have been seen by independent observers since. The Resolution of the Third Meeting of the Sixth People’s Congress of the TAR Concerning Resolutely Opposing the Dalai Lama’s Illegal Acts of Unilaterally Declaring the Reincarnation of the Panchen Lama (May 25<sup>th</sup>, 1995) affirmed the criminal nature of the Dalai Lama’s claims ‘from the point of view of religious tradition, historical convention and legal standpoint’ (Losel 1996:6).

On 29 November 1995, a secret divination ceremony was organised by TAR authorities which resulted in the government naming Gyancan Norbu as the 11th Panchen Lama. The divination was criticised by witnesses for being fixed, most notably by the Deputy Chairman of the Buddhist Association of China, Arjia Rinpoche, who went into exile shortly after (Arjia 2010:204). The divination involved the drawing of lots from a Golden Urn, a method first implemented by the Qianlong emperor in 1793. Forming the basis for the government's dismissal of the Dalai Lama's choice, this ceremony allowed the government to claim that they controlled the only valid customary method of recognition and that the Dalai Lama was disregarding traditional practice. These events are also key to understanding the origins of the Measures for Managing Reincarnation.

The use of the Golden Urn has attracted considerable controversy, not only for its role in the fate of the 11th Panchen Lama but also for its role as a method of intervention in Tibetan affairs by the Qing imperial court. The official PRC history of Tibet states that the Golden Urn came into use following the implementation of Article 1 of The 29-Article Ordinance for the more efficient Governing of Tibet (1793) and that this document represents 'a systematic summary of the Central Government rule over Tibet during the early and middle period of the Qing dynasty' (Wang and Nyima 2001:69).<sup>111</sup>

An assessment commonly found in literature on the subject, and the view endorsed by the Tibetan-Government-in-Exile, is that the Golden Urn was used inconsistently and that its use is not an indication of direct Qing rule over Tibet (Bell 1987:51, Van Walt Van Praag 1987:21, Smith 1996:135-140). Although the implications of the urn's existence remain controversial, there is consensus that the Golden Urn was introduced as a consequence of the emperor Qianlong being drawn into a costly and complex campaign against the Gurkhas on behalf of Tibet. Specifically, evidence suggests that Qianlong considered corruption and inefficiency in the Tibetan government to be a contributing factor in the failure of Tibet to resolve the Gurkha crisis without Qing intervention (Sperling 2012).

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<sup>111</sup> It should be noted that there is no complete Chinese source of the regulations and the only extant copy of the final document is in Tibetan. It is reproduced in original and translation in Sperling (2012).

For the Chinese government, the Golden Urn has become an unlikely symbol of the rule of law. Chinese sources pay considerable attention to The Golden Urn, highlighting its historical importance. It is photographed and described in the official history, it is referenced in government speeches, and the most comprehensive study of it was authored by Liao Zugui and Li Yongchang in *Zhongguo Zangxue* (Wang and Nyima 2001:73, Sperling 2012:98). It is also part of the curriculum in the Patriotic Education Campaign carried out in monasteries and nunneries (GOPPE 1996a:8). The Ordinance which mandated its use is described as the ‘most important law at that time’ and by presenting it as such, the government has established historical precedent for its legal control of the reincarnation process (Wang and Nyima 2001:66). Article 8 of the MMR stipulates that the Golden Urn is to be used to select Living Buddhas if it has previously been used for this purpose. Given the particular historical use of the Golden Urn in the selection of Dalai Lama’s it is probable that the government is positioning itself for the selection of the next Dalai Lama. For example, in 2011 a spokesperson for the Foreign Ministry stated:-

The title of the Dalai Lama is illegal if not conferred by the Central Government...According to the Regulations on Religious Affairs and the Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism enacted by our country, the reincarnation of any living Buddha, including the Dalai Lama, should follow the religious rituals, historical conventions as well as laws and regulations (Hong 26th September 2011).

By imposing political conditions upon citizens throughout the process of death and rebirth the MMR reveals the numerous contradictions embedded within the PRC’s attempt to regulate religious activity according to the law. Despite the assertion that the enforcement of religious regulations in Tibet will ‘separate political actions from religious affairs and ensure the freedom of religious belief’ the conditions imposed upon reincarnation process explicitly extend the jurisdiction of Chinese law to non-physical planes of existence traversed by the deceased before rebirth (TIN and HRW 1996:30). This is both a mimicry and a subversion of traditional Tibetan beliefs concerning the intersection of Dharma, law and politics. If, however, the intention was to extend secular control over Tibetan Buddhism then this subversion cuts both ways. In revealing the ideological content of the ‘rule of law’ the MMR also subverts its own claim to rational authority.

This then is the deeper contradiction of the PRC's religious affairs legislative project. Its particular commitment to secular modernity renders it unable to adequately engage with religion without drawing attention to its own ideological origins. Key to this is the contradictory nature of modernity's faith in progress, 'the tale of secularism's graded triumph over a diminishing force of the religious' (Fitzpatrick 2008-2009:323). Following Document 19, law governing religion in the PRC has become specifically linked to a process of adaptation derived from Marxist evolutionary discourse. In Tibet, in both its coercive and persuasive roles, such law is presented as a civilising force of change. This particular articulation of progress, of modernity, relies upon the construction of a backward, uncivilised past:-

The day that the spring wind of science and technology blows vigorously across the snow highlands will certainly be a time when the broad masses of the people consciously throw off the spiritual bondage of religion, bid farewell to ignorance and backwardness, and move swiftly towards a civilised society (Liu 19<sup>th</sup> January 1997).

The difficulty with such a formulation is, as pinpointed by Bhaba, that:-

The value of modernity is not located, a priori, in the passive fact of an epochal event or idea—of progress, civility, the law—but has to be negotiated *within* the 'enunciative' present of the discourse (Bhaba 1991:201).

In other words, modernity's commitment to the idea of progress hinges upon a continual iteration of the present as a sign; a compulsive insistence upon its 'contemporaneous reality ... making problematic its own discourse not simply "as ideas" but as the position and status of the *locus* of social enunciation' (Bhaba 1991:201). The argument that emerges from this is that by divorcing itself so irrevocably from a pre-modern, uncivilised past, modernity is unable to recognise its own contingencies.

To return to the PRC's Measures on Managing Reincarnation, what is revealed is that such contingencies can force a contradictory engagement with alternative cultural and historical realities. As Fitzpatrick put it: 'A present so derived cannot provide a carapace keeping out other historical engagements with law and

religion' (Fitzpatrick 2008-2009:324). At issue then, is if, and how, this contradictory engagement challenges the foundations of the 'socialist modernisation' project.

What I want to suggest here is that in addition to the multiple, specific contradictions within the contemporary legislative system governing religion in the PRC there is a fundamental contradiction which weakens the legislative project, and that this weakness cannot be automatically resolved through a proliferation of legal measures.

The explicit commitment to a particular notion of progress, of backwardness, places significant constraints upon the official engagement with Tibetan Buddhism. The assertion of backwardness involves a denial of a complex and sophisticated history of philosophical enquiry. Yet, far from being an artefact from a lower stage of evolution, Tibetan Buddhist philosophical tradition has shown itself to be a living tradition capable of entering into a dialogue with divergent scientific disciplines such as neuroscience, quantum and nuclear physics, artificial intelligence and experimental psychology. The assumption that science will invalidate Tibetan Buddhism misunderstands the methodology of Tibetan Buddhist philosophical enquiry. Simply put, Document 19's belief in an age in which:-

the vast majority of our citizens will be able to deal with the world and our fellowmen from a conscious scientific viewpoint, and no longer have any need for recourse to an illusory world of gods to seek spiritual solace (CCCP 1982:383).

is not antithetical to the Tibetan Buddhist philosophical goal of understanding the nature of reality. The contradiction is that by insisting upon the backward nature of Tibetan Buddhist belief, the government has committed itself to engaging on only the most superficial of levels. Rather than reinforcing the backwardness of Tibetan Buddhist philosophy, what this suggests is an official incapacity for sophisticated enquiry. This has implications for state attempts to adapt religion to socialism through persuasion, for such an incapacity means that the grounds for persuasion will remain intellectually insubstantial and weak. Seen in this light, the state has sown the seeds for its own failure, at least within the terms of this particular ideological argument. The exact impact of this *theoretical* failure is hard to gauge. I suggest however that it is

relevant to understanding the PRC's attempts to regulate religion according to law. It also undermines the official claim that the struggle against the 'Dalai clique' is 'the continuing struggle between ourselves and the imperialists since they invaded Tibet a hundred years ago' (Ragdi 1996:156).

## Chapter Nine

### 9:1 Introduction

This thesis began with the observation that there were fundamental differences in how Tibet and China sought to resist Western imperialism. One reason for this was that the religious foundations of the Tibetan state necessitated a different kind of negotiation with modernity. A second, equally critical factor was Tibet's role in the 'Great Game.' The ensuing rise of British influence in the region had the important effect of rendering Tibet's legal status ambiguous. This ambiguity in legal status cannot, however, fully explain the subsequent loss of international legal identity. This leads to a third key aspect, which is that Tibet's relationship with British India during the era of decolonisation set Tibet apart from a rapidly modernising society of postcolonial states.

The legacy of the British involvement in the region is therefore much more complex than a direct effect of the imposition an unequal relationship between a colonial power (British India) and its neighbours. Whilst British incursions into Tibetan territory initiated conflict in the region, decolonisation revealed a new hegemony which operated to exclude Tibetan representation. The PRC has adopted the position that British imperialism in Tibet is responsible for continued unrest in the region, stating that, 'There was no such word as "independence" in the Tibetan vocabulary at the beginning of the twentieth century' (Information Office of the State Council 1992). However, it must be considered that coercive policies of adaptation pursued by the PRC in Tibet reveal contradictions in this position. The 'Tibet Question', has also revealed contradictions within postcolonial international legal discourse. This suggests that the convergence of the British imperial legacy with PRC law and governance has been largely mediated through the discourse of modernity, and that this has facilitated the production of subalternity in the postcolonial context.

### 9:2 A Summary of Findings

Chapter two argued that three factors have reinforced the PRC's territorial claims to Tibet by creating an image of Tibet as a 'pre-legal' society that possessed

few or none of the institutions necessary to the modern state. Firstly, Tibetan social theory, including law and politics, has seldom been the subject of detailed analysis in Western studies of Tibet. This chapter took the important step of drawing together a wide range of sources on Tibetan law, many of which are obscure and embedded in studies not specifically concerned with the law. Secondly, this paucity of scholarship has been compounded by the emergence of a popular discourse in the West that presents Tibet as an other-worldly 'Shangri-La'. Thirdly, the philosophical grounds of the Tibetan system of law and governance were not readily adaptable to Western concepts of the 'rule of law' and this created difficulty for Tibetan attempts to join the family of nations.

One position which emerges from this is that Orientalist traditions of colonial scholarship have impeded Tibetan political aspirations by encouraging a misrepresentation of Tibetan society. In this, British imperial exploits in the region can be seen to have had an enduring effect upon the understanding of Tibetan legal identity, owing to their role in the creation and dissemination of a broader colonial discourse which neutralises Tibetan political and legal agency.

Meanwhile, Western encroachment of China's ports challenged the legitimacy of the Qing Court and altered China's perceptions of its frontier territories. Consequentially, traditional relations between Tibet and the Qing dynasty underwent a profound shift, with the Buddhist foundations of this relationship, and its reciprocal nature, becoming obscured by the Court's attempts to assert its sovereignty. This shift was compounded by events in Tibet, where continued Tibetan resistance to British India's frontier policy resulted in the 1904 British invasion of Lhasa. The result was the further disintegration of traditional Chinese and Tibetan systems governing international relations. The invasion was also the precursor to several treaties that had significant ramifications for the legal status of Tibet.

The analysis of these events in Chapter three led to the conclusion that by the turn of the twentieth century, Tibet had come to occupy a contradictory space, neither independent nor part of the Russian, British or Chinese empires that sought to control Tibet's status as part of their own frontier defence strategies. In Western discourse Tibet was at once an other-worldly domain that transcended the temporal, mundane



concerns of Western colonialists, and, in British Indian sources in particular, a potentially dangerous worldly frontier, across which a Tibetan-Russian alliance might threaten India. Despite the paradox of Tibet's other-worldly mystery and its menacing worldliness, in both constructions Tibet represented the limits of the British Empire, a space that hovered on the borderlines of civilisation, but remained somehow apart from it.

One way of understanding the significance of these events is to consider how the engagement of Imperial China with Western Imperialism was transformed by the modernising moves of the Republic of China into an affirmation of the universal standards of civilisation that had arisen within Europe as a result of the colonial encounter. This was the subject of analysis in Chapter four. The significance of this analysis is that it reveals the complex nature of the British imperial legacy. The position suggested by Chapter two was that processes of Western colonial domination have altered understandings of non-European systems of knowledge. Chapter three extended this by showing how British imperial encroachment transformed traditional geopolitics across the Himalaya and purposefully rendered Tibet's legal status ambiguous.

In a recent discussion on why there no subaltern studies for Tibet, Hansen (2003:8) observed that 'the absence of subaltern studies in Tibetan studies is rooted in a belief in what might be called "Tibetan exceptionalism."' In light of the analysis presented in Chapters two and three, the question might be asked: to what extent is this absence a product of the British imperial legacy in the region. Shakya (2001:183) has argued that the 'orientalist descriptive mode' which continues to pervade the field of Tibetan and Buddhist studies can be traced back to colonial traditions of scholarship. Given this to be the case, there maybe grounds for arguing that the lack of subaltern studies for Tibet is due to the persistence of this British imperial legacy. Nonetheless, subalternity is not only to be understood as a product of colonialism. In the words of Spivak (2005:476) 'Subalternity is a position without identity...Subalternity is where social lines of mobility, being elsewhere, do not permit the formation of a recognisable basis of action.' The broader answer to this question therefore requires a consideration not only of colonialism, but of other totalising ideologies that coalesced around the colonial encounter such as nationalism and modernity.

The circulation of modernity in Chinese nationalism discussed in Chapter four is informative in that it reveals an interface between an assumedly superior set of modern, universal normative values and traditional culture. Whilst China's appropriation of European Public Law operated as a tool of resistance, it also perpetuated and reinforced the concept of a 'standard of civilisation'. The circularity of modernity created paradoxical sympathy between China and the West. This had ramifications for how traditional relations between Tibet and China became translated into the terms of international law. Beyond that, the Chinese nationalist project reinforced a notion found in European positivism that legal and political systems operated at a supra-national level, leaving the uniqueness of the nation intact. That this gives rise to a contradictory position was illustrated in the discussion of the problematical rise of the *rebus sic stantibus* doctrine, which revealed the impossibility of maintaining a clear distinction between law and politics in the face of actual state practice. This in turn drew attention to the contradictions inherent in the Chinese Nationalist project to create a modern nation-state from the ashes of empire.

Chapter five extended this discussion through a consideration of how the Republic of China used modernity as a tool to enforce and restructure power relations at the local level as part of a drive to extract revenue. As part of the Republic's effort to restore sovereign equality profound institutional changes were implemented in the name of modernisation not only to meet Western standards, but also to appropriate village institutions as part of a state drive to extract resources. The significance of this is that it is therefore inadequate to consider modernity to be an externally imposed force.

The Nationalist's attempt to eliminate the irrational and unscientific from secular law and governance did however reflect an international drive to develop the science of administration in the framework of law. Chapter five argued that rather than being tangential to and superseded by the era of institutional international law, the 'standard of civilisation' remained central and pervasive, achieving continuity in modernist assumptions of rationality and scientific administration, which rather than being universal and neutral are intimately indicated in assertions of state power.

Chapter Six revisited a topic first touched upon in Chapter two, the absence of studies on Tibetan social and legal theory. The starting point for discussion was that this absence echoes difficulties involved in Tibet's struggle to claim an international legal identity. One difficulty discussed arises from the necessity of articulating that legal identity in the terms of modernity. A point raised was that the events that mark the encroachment of Tibetan identity paradoxically become the markers of its independence. Thus, the Anglo-Tibetan Treaty of 1904 is cited as proof of legal identity despite the fact that it was imposed by force.

The significance of this lies in the linkage between legal identity, the capacity to be modern, and British imperialism. In the early twentieth century it became clear that Tibet could not rely upon its traditional institutions of law and governance to protect itself from foreign encroachment. For these reasons Tibet began a process of modernisation: educating members of the elite in British schools, modernising the army, undertaking legal reform and infrastructure improvement. As discussed in previous chapters, China faced similar demands to meet the 'standard of civilisation'. This resulted in the appropriation of Western 'technologies' of law and science in order to create a modern national identity capable of resisting imperialism. There are, therefore, parallels between Tibetan and Chinese efforts to engage with modernity.

There are also significant differences. One issue frequently discussed in primary and secondary sources is that in Tibet there was significant controversy attached to this modernisation project due to the perceived threat of secularisation. This resistance to modernisation is often cited in primary and secondary sources as a cause of the failure of the Tibetan state. Such analysis achieves continuity with contemporary PRC criticism of Tibet's cultural incapacity for modernisation, a criticism that is used to legitimise coercive state intervention. This particular difference between China and Tibet has therefore become imbued with consequence.

However, the fixation on proving or disproving Tibet's capacity for modernisation distracts from a critical issue, which is that Tibetan efforts in the early twentieth century to create a modern identity involved increasing Tibetan ties to the British Empire. The problem is not simply that this relationship was a by-product of Curzon's 'Great Game', or that it was the British invasion of Tibet that created the

legal basis for British and Tibetan relations. Neither is it simply that British imperial interests dictated that Tibet's status should be left undefined. The problem is also that when Tibet turned to Britain in order to protect itself from, first the Republic of China, and later the People's Republic of China, it set itself apart from a rapidly modernising society of postcolonial states.

Chapter six examined this problem by looking at two of the most significant legal instruments concerning Tibet's status in the twentieth century; the Simla Convention (1914) and the Seventeen Point Agreement (1951). The Simla Convention, the last treaty between Britain and Tibet, looks backwards to an era of imperial expansion in which legalised hierarchy allowed sovereign equality to be something enjoyed by only the most civilised of nations. In contrast the Seventeen Point Agreement looked forwards to a time of legalised equality within the modern socialist state. Yet it was the Seventeen Point Agreement, with its provisions for PRC sponsored development of education, agriculture, livestock raising, industry and commerce in Tibet, that marked the end of Tibet's independent existence. This raises some uncertainty about what the measure for equality is; for the boundaries drawn around Tibet's status in 1914, despite disavowing equality, did affirm legal personality.

The conclusion reached following this examination was that it is inadequate to blame British imperial expansion in the region for Tibet's lack of legal status or for the PRC's subsequent incorporation of Tibet. Certainly, the evaluation of imperialism is of critical importance: it marks the dividing line between the PRC's claim that Britain created the myth of Tibetan independence and the Tibetan Government-in-Exile's claim that Tibet's interaction with the British empire proves Tibetan independence. However, the incoherency and inequality of British imperial policy in the region cannot fully explain the lack of appraisal of Tibet's legal status in the discipline of international law. Whilst imperialism changed Tibet's significance on the map, it was the end of empire that saw its erasure; and this erasure is a very twentieth century phenomenon, emerging at the moment in which the colonial became the postcolonial.

The influence that independent India had upon the failure of Tibet's appeal to the U.N is one example of this phenomenon that was discussed in Chapter six. The

examination of Nehru's dismissal of Tibetan idealism highlighted the difficulties Tibet faced in defending its position in the postcolonial world. However, the exclusion of Tibet from legal discourse points to a deeper contradiction created by the impulse to disavow the colonial antecedents of law in the postcolonial age. The argument put forwards in Chapter six was that the exclusion of Tibet from legal discourse reveals the limits of the 'post' in postcolonial, or in other words that subalternity is the creation of the postcolonial, as well as the colonial world.

The effect that this has had upon perceptions of Tibet's legal status is significant and has implications for the way that legal argument is made. This was illustrated by a detailed critique of Crawford's analysis of Tibet's status in his classic study on the creation of states in international law. This critique identified a theoretical split between the desired supra-social functionalism of law and the contingent factors that bring law into being and argued that this impinged upon Crawford's analysis of suzerainty and autonomy. By privileging the continuity of law as a system of objective thought, Crawford's analysis becomes dislocated from historical event. Chapter six argued that the dynamics of a legal analysis which seeks an underlying coherence and historical continuity will create flaws in the logical structure of the analysis. In the example used Crawford's argument relied upon the fallacy that the historical use of the terms suzerainty and autonomy reflects contemporary definitions. The argument made in Chapter Six is that this dynamic within legal argument is intimately related to modernity's faith in progress and linear history, which requires that the present affirms its own logic by appropriating what came before as a step on the path to development.

As previously noted, the appropriation of modernity by the Republic of China reinforced the notion that European Public Law was founded upon universal normative values. It also enforced a concept of scientific rationality that devalued traditional belief systems by associating them with irrational superstition. This dynamic was strengthened by the adoption of atheist materialism in the People's Republic of China. Given the PRC's self-identification as a liberating force against imperialism this gives rise to some interesting questions when considered against the backdrop of the analysis in Chapter six: if the postcolonial position within international legal discourse is contradictory, are there similar contradictions within the position adopted by the PRC

towards Tibet, and if so, to what extent does this alter an understanding of Tibet's contemporary status as an autonomous region of the Chinese state?

An analysis of legislation governing Tibetan autonomy in Chapter seven revealed a tension between the state goal of socialist modernisation and the state protection of Tibetan ethnic difference. This tension can be traced back to Mao's observation that ethnic minorities occupied 50-60 percent of the territory of the PRC and that these areas contained economically significant natural resources that could only be exploited with correct management of the local population. In this context the system of Regional National Autonomy can be seen as a method rather than a goal, or in other words that autonomy is the process by which the socialist modernisation of the unitary state can be best achieved.

A result of this tension is that the state has used the law to mould Tibetan cultural identity so that it becomes compliant to overarching goals of modernisation. A particular feature of the state's efforts to redefine Tibetan culture in the terms of socialist modernisation is the separation of religious and ethnic identity, which was discussed in Chapter eight. This revealed contradictions in the PRC's attempt to create a coherent body of law that outwardly projects a broad tolerance of private religious belief and the attempt to adapt religion to socialism.

The attempt to adapt religion to socialism has forced the state to engage with metaphysical and historical realities in a way that undermines its 'rule of law' rhetoric. An examination of the contradictions in official attempts to regulate religion reveals the limitations of the state's ideological commitment to modernity. This engagement also challenges the view that present day Sino-Tibetan conflict is a product of British imperial intervention. Whilst the PRC's territorial claim to Tibet can be seen as part of a defensive response to Western imperialism, this cannot adequately explain the ongoing threat that Tibetan Buddhist activity presents to the CCP. This suggests that the PRC insistence that British imperialism has created Sino-Tibetan conflict operates as no more than a straw man, and that this serves to mask weaknesses in the state's ideological position. Paradoxically, the state's attempt to derive legitimacy from an espousal of materialistic progress parallels the discourse of the 'civilising mission' used to legitimise Western colonialism.

Furthermore, the PRC's adoption of the rule of law has facilitated processes of domination and subjugation that have worked to obscure Tibet's legal identity. A particular way that this has achieved authenticity is through the linkage of the rule of law to concepts of universal development which suggest that modernisation is both inevitable and desired. This suggests the possibility that it is not simply the obscurity of Tibet's legal identity that is of issue, but the manner in which a commitment to the rule of law may operate to close down debate of alternative theories of modernisation, thus preventing critical analysis of dominant normative values.

### **9.3 Placing the Findings in Context**

By examining issues broadly related to the British imperial legacy in Tibet, this thesis has largely focused upon firstly, the processes which have led to Tibet's current status as an autonomous region of China and secondly, the processes that have influenced perceptions of that status. This can be seen as an attempt to rehabilitate the issue of Tibet as a topic worthy of consideration in international legal discourse, the argument being that the lack of consideration of Tibet's status reveals something about how subalternity is produced and maintained within the discipline. It has been beyond the scope of this study to consider developments in public international law that may have future significance for the Tibetan people's right to self-determination, although this represents a potentially fruitful area for further research. It is therefore useful to briefly consider how the issues explored within this thesis might intersect with such fields of inquiry. One way of approaching this is to consider recent developments concerning the rights of indigenous peoples, as articulated in the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (DRIP) of which China is a signatory.

The fact that Tibetans are a distinct people under the terms of international law has been usefully dealt with by Bello (in McCorquodale and Orosz (eds.):35) and is supported by the 1961 U.N General Assembly Resolution 1723 which called for 'the cessation of practices which deprive the Tibetan people of...their right to self-determination.' Whether or not the Tibetan people maybe classed as indigenous is a separate issue, but a claim could be made on the basis of a shared cultural, linguistic and religious Tibetan identity within the boundaries of a historic homeland. It should

be noted that whilst the International Work Group for Indigenous Affairs includes Tibetans on its database, it observes that the Tibetans consider themselves an occupied nation rather than an indigenous people (IWGIA). Meanwhile, ethnographic studies suggest that it is more meaningful to talk about a Tibetan civilization (Stein 1972). Further complicating the issue is the fact that DRIP does not specify a definition of indigenous people, nor does it provide an enforcement mechanism.

There is, nonetheless, some value in considering what the principles of DRIP might add to the understanding of Tibetan autonomy. That DRIP has specific relevance to systems of autonomy is implicit in Article 46(1), which states that: -

‘Nothing in this Declaration maybe interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.’

This particular provision has provoked criticism on the basis that it is a retrogressive limitation of indigenous rights, ‘a travesty of a mockery of a sham,’ that consecrates in law the structure of internal colonial domination (Churchill 2011). However, inasmuch as DRIP suggests options for a *stronger* form of Tibetan autonomy, the affirmation that a right to self-determination need not automatically lead to secession is perhaps, for the Tibetan people at least, a useful one.

An articulation of Tibetan autonomy that accorded to DRIP would potentially offer a number of advantages. A minority exists only in relation to a majority within the State, while an indigenous group does not. Definitions of indigenous peoples place emphasis upon historical continuity and ancestral territories, as expressed by the notion of ‘priority in time’ employed by Special Rapporteur Daes (UN Doc.E/CN.4/1996/2 paras.10-41). This potentially carries great force. It goes beyond a right to protect the past, or preserve cultural memory, and suggests that a shared history as a unique people gives rise to the right to a *process of continuity*. Article 11, for example, states ‘Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present



and future manifestations of their cultures...’ This is reinforced by Article 13 which places states under an obligation to protect indigenous peoples’ ‘right to revitalize, use, develop, and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures...’

In comparison with the system of regional autonomy in place in the PRC, this affords a stronger protection of cultural rights. As discussed in Chapters seven and eight Tibetan autonomy within the PRC is significantly constrained by a state commitment to the idea that self-identification as a minority is a transitory experience which will recede as a progressive attainment of socialist unity comes into being. The state apparatus of development and modernisation accommodates minority culture within the context of this *process of becoming*, but the evolutionary paradigm within which this occurs works to transform these components of lived culture into *memento mori* artefacts; the expression ‘remember you will die’ here being articulated in state displays of traditional culture which act as reminders of how far the modern state has come. In such a context traditional culture operates as a counterpoint to modernity’s progress, a static point of origin. Hence, Tibetan language is taught as an adjunct to Tibetan history, and both are non-essential components of the modern education syllabus.

Meanwhile, a system of autonomy based upon the principles of DRIP could challenge the state’s right to enforce a particular *process of becoming* modern. It could envisage the right not simply to retain access to cultural traditions, but to establish and control contingent systems and institutions capable of transmitting those traditions, as expressed in Article 14’s right to control education, for example. Additionally, autonomy based upon DRIP would be required to protect the right ‘to manifest, practice, develop and teach’ religious traditions, thus collapsing the distinction between ethnic and religious identity articulated in current PRC legislation (DRIP Article 12).

However, it is by no means clear how or if the theoretical possibilities suggested by DRIP could translate into practice. The PRC as a signatory to the declaration has signalled support for the rights of indigenous peoples, but this support is placed emphatically in the context of resistance to Western colonialism. The PRC’s

response to a draft of the declaration in 1995 was: 'The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world' (U.N Doc.E/CN.4/1995/WG.15/2). Speaking at the 53rd session of the United Nations Commission on Human Rights (1997), Long Xuequn, adviser of the Chinese delegation, said:-

'As in the case of other Asian countries, the Chinese people of all ethnic groups have lived on our own land for generations. We suffered from invasion and occupation of colonialists and foreign aggressors. Fortunately, after arduous struggles of all ethnic groups, we drove away those colonialists and aggressors. In China, there are no indigenous people and therefore no indigenous issues' (Long 1997).

It is worth noting that the working definition of indigenous peoples referred to in drafting process of the declaration placed particular emphasis upon the role of 'self-identification', stating that: 'This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference' (UN Doc. E/CN.4/Sub.2/1986/7 paras 379-382). Clearly, the rights of an indigenous people derive from the particular experience of being a people and DRIP identifies the need to protect that experience from encroachment by dominant sectors of the society within which such people exist. If the purpose is to neutralise the effects of inequality between indigenous peoples and the states within which they reside, then there can be no logical basis for permitting the state to unilaterally decide who are, and who are not, indigenous peoples.

Nonetheless, by placing the issue within the context of resistance to colonialism China has side-stepped this objection by returning the issue to the question of inequality between the First and Third World. This position recalls the argument that Tibetan nationalism was the artificial creation of the British, as expressed in Chen Kuiyuan's attack against the Dalai clique, 'This struggle is the continuing struggle between ourselves and the imperialists since they invaded Tibet a hundred years ago' (Chen 1994:156). Such an argument self-consciously places China at the forefront of the movement for resistance and reform which brought the postcolonial world into being.

There is support for this position. For example, the League of Nations used the term 'indigenous' to distinguish between colonial powers and peoples living under colonial domination (U.N. Doc.E/CN.4/Sub.2/AC.4/1996/2, paras.14, 16). More recently, Special Rapporteur Martinez suggested that the definition of an indigenous people should give priority to their historical precedence in a territory rather than a concept of self-identification. This had the effect of shifting the classification process away from the collective perceptions of the group, and onto assessments of political history. The issue here is: who controls the 'authentic' historical narrative? Given the presumed inequality in power relations already at play, the legitimacy of a historical narrative is likely to be highly contested and subject to immense political influence. The PRC governments' employment of the Golden Urn as a mechanism for extending legal control over reincarnating Tibetan Buddhist lamas, under the rubric of protecting the freedom of religion, is a case in point.

Martinez concluded that: 'the end of traditional colonial power in Africa and Asia necessarily and radically changed the concept of what was meant by 'indigenous' as a result of a new political context whose most visible symbol was the independence of the State' (UN Doc.E/CN.4/Sub.2/1995/27 para.114). Whilst Martinez did not deny that other indigenous peoples might inhabit postcolonial African and Asian states, his conclusion had ramifications. His point was that because all peoples within these territories are effectively indigenous to the area, non-dominant peoples within African and Asian states are generally identified as minorities. Therefore, their complaints are better dealt with by the U.N Working Group on Minorities, not the Working Group on Indigenous Populations.

The dichotomy that Martinez identifies between minorities and indigenous peoples is significant (UN Doc.E/CN.4/Sub.2/1995/27 para.125). The distinction implies a difference in the threshold of self-determination. The International Covenant on Civil and Political Rights protects the rights of 'persons belonging to minorities' to 'in community with other members of the group to enjoy their own culture, to profess and practice their own religion, or to use their own language.' However, the use of the wording 'persons belonging to minorities' (Article 27) places emphasis upon the individual rather than the group. In contrast, the rights of indigenous people's are articulated primarily as collective rights. One of the conclusions suggested by Chapter

eight of this thesis was that the protection of the individual right to freedom of religion was inadequate for protecting the Tibetan Buddhist tradition. Indeed, the focus upon individual freedom of religion is arguably *detrimental* to the survival of Tibetan culture because it has enabled the state's claim to be upholding international standards, whilst implementing a separation of religious and ethnic identity that in reality facilitates increased state control.

Placing emphasis upon minority rights, rather than indigenous rights, also has implications in relation to what has been termed the 'developmentalisation of human rights' (Rajagopal 203:222). Chapters four and five of this thesis discussed how the standard of civilization achieved continuity in modern institutions, from the League Mandates' scientific administration of peoples unable to achieve self-governance unaided, through to development models that prioritise economic expansion regardless of environmental and social costs. A comparable dynamic is discernible in the Republic of China's appropriation of Western modernity, which facilitated increasing state intervention in civilian life, restructured power relations at the local level and legitimised revenue extraction. That this dynamic persists in the contemporary system of Regional National Autonomy within the PRC was shown by Chapters seven and eight.

Identification as a minority rather than an indigenous people potentially alters the context within which development occurs. DRIP provides for indigenous peoples to control 'lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' (Article 26) and also stipulates a right to redress when such lands, territories and resources have been exploited without consent (Article 28). In combination with the strong rights to control and revitalise cultural institutions noted above, autonomy based upon these principles would therefore be significantly different to the system currently governing the Tibetan Autonomous Region.

As observed in Chapter seven the PRC can be considered at the forefront of international policies in preferential treatment for minorities. The difficulty, as revealed in the analysis of the Regional National Autonomy Law, is that the emphasis upon implementing equal access to state resources for persons belonging to minorities

does not automatically allow minorities to articulate alternative models of cultural, political and economic development. In this context, even allowing for the points of conflict discussed in Chapter seven, the PRC may realistically expect to meet most of its obligations under the International Covenant on Civil and Political Rights whilst at the same time developing policies aimed at cultivating the adaptation of Tibetan ethnic identity to the modern socialist state. Arguably, what the threshold between the rights of minorities and indigenous peoples implies is a different negotiation with modernity. One possibility that arises from this is that by emphasising a *process of continuity*, rather than representing traditional culture as a point of origin in the *process of becoming* modern, the articulation of indigenous people's rights might help to resolve the contradictions inherent to modernity's myth of progress.

To revisit arguments made in Chapter five, the discourse of modernity was shown to be an enabling strategy for the Chinese Nationalist party espousing the sovereign equality of China, but it was also a limiting and contradictory one because it produced positions incapable of recognising their own origins.

Chapter six, found comparable contradictions are created by a tendency to fit state practice into a pre-existing vision of what the law is, or should be, because this not only excludes inconsistent practice from the frame but enforces a concept of the state as a rational entity on a path of evolutionary progress. The primary contradiction that arises in relation to this is that the maintenance of law's coherency and continuity, integral to its universalistic claims, requires the exclusion of certain voices, be they the now unsavoury expressions of colonialism or other articulations of the local and the particular which threaten the general vision of modern international law's unity.

Contradictions are also to be found in the PRC's commitment to modernity as expressed in the state's project of socialist modernisation. This is particularly visible in the government's handling of religious issues. Chapter eight concluded that by insisting upon the backward nature of Tibetan Buddhist belief, the central government has committed itself to engaging on only the most superficial of levels. Because this creates an official incapacity for sophisticated enquiry, the state has undermined its own ideological argument.

One way of interpreting this, is that because such contradictions subvert the foundational philosophy of the state, they therefore represent a fundamental threat to the state's legitimacy. In this context, the suppression of aspects of Tibetan culture represents a suppression of weakness within the state's ideology. To return to an earlier event, this is one way of reading the 1959 Tibetan rebellion that resulted in the termination of the Seventeen Point Agreement. The official PRC interpretation of this revolt is that it was the work of a section of the ruling class in alliance with Western imperialists. This interpretation forms part of an official PRC narrative of liberation and progress (Information Office of the State Council 1992). However, the nature of the rebellion was far more complex and involved a cross-section of Tibetan society not represented by a particular economic class demographic (Norbu 1979; Shakya 1999). The widespread, popular, Tibetan insistence upon maintaining traditional social systems and institutions therefore represented a significant challenge to the legitimacy of the central government's ideological position that the Tibetan people were oppressed and in need of socialist intervention.

There are similar contradictions embedded within the PRC's claim to legitimacy through identification with the postcolonial. Whether or not China's historical claim to Tibet is valid, the dynamics of Chinese rule over the Tibetan people is played out in distinctly imperialistic terms, the legitimising narrative of liberation and socialist intervention achieving continuity with Western accounts of colonialism's civilising mission. The PRC's denial that DRIP might have any application to its own system of law and governance has parallels with the Republic of China's argument against international trusteeship at the 9<sup>th</sup> Institute of Pacific Relations Conference; the argument being not against decolonisation per se, but against the implications that this would have for China's claims to Tibet and Mongolia. In both cases, this engagement therefore subverts the concept of a strict dichotomy between the First and Third World, or the colonial and the postcolonial. This is not to deny the profoundly inequitable dynamics of colonial rule, rather it is to consider that the colonial encounter opened up an interface between different cultures. The possibility that arises from this, is that such an interface allowed for the cross-cultural dissemination of systems of domination and subjugation, in which the 'rule of law' became intimately implicated. Against this backdrop, it is perhaps useful to recall the argument made by Mattei and Nadar (2008:12) that 'the mechanisms through which the transnational rule of law, as a

deeply Western idea, has led incrementally to patterns of global plunder...independent of explicit political or military colonialism.’ This provides another way of framing the issue of how the British imperial legacy in the region has converged with contemporary PRC law and governance to alter understandings of Tibet’s legal identity. In such a context it is also perhaps prudent to question whether the principles articulated in DRIP are robust enough to carry force.

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